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The Legal History of State Legislative Vacancies and Temporary Appointments

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We love paying attention to special elections. They operate as catharsis for opposition parties and activists, easily serve as proxies for how well the governing party is doing, and are ripe for over-extrapolation by prognosticators. But in thirty states and territories throughout the United States, state legislative vacancies are filled by a combination of special elections and temporary appointments. These appointment systems are rarely studied or discussed in academic literature but have a fascinating legal history that dates back to pre-Revolutionary America. They have substantially changed in the last four centuries, transitioning from a system that, like the Electoral College, was built on putting a buffer between voters and the government, to a system rooted in Progressive Era ideals. Telling their history—how they were adopted, how they have changed over time, and how they operate today—strengthens our understandings of anti-democratic institutions in the nineteenth century and of how progressive reforms work together. But their history also speaks volumes about how they, and the Seventeenth

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* Law Clerk, United States Court of Appeals for the Eleventh Circuit. This Article has been a labor of love, and the research for it was largely conducted while studying for the bar exam. It would not have been possible without the assistance of countless research librarians, state archivists, and government officials, and I extend my gratitude to all of them. I am also immensely appreciative of Dean Robert Schapiro for his advice and suggestions, Samin Mossavi for her encouragement and resourcefulness during this endeavor, Richada Ky for her everlasting patience as I wrote this, and the various friends, family members, and coworkers who have been on the receiving end of my enthusiasm about legislative vacancies. And finally, to the staff of the *Journal of Law and Policy*, your hard work and dedication has substantially strengthened this Article, and it has been a pleasure publishing it with you. Thank you for giving me a platform to share my esoteric passion.

Amendment, should be interpreted and understood today. This Article tells their story.

INTRODUCTION

If a state legislator dies—or resigns, is expelled, or otherwise leaves office, voluntarily or not—how is she replaced? We might assume that she'll be replaced on a seemingly random Tuesday[1] in a low-turnout special election, the results of which will be dramatically extrapolated by political prognosticators as proof that the president's party, or the opposition party, is in trouble, as the case may be. And, admittedly, in many states in the country, that would be the course of action.

But in half of the states—along with almost every territory and the District of Columbia—she might be replaced with a temporary appointment.[2] The mechanics of these temporary state legislative appointments[3] vary from state to state but have more in common with each other than not. For example, the vast majority require same-party appointments—that is, that the appointee be of the same party as the previous incumbent—but several don't.[4] Others place the appointment power in the hands of the state (or local) party directly, while others place it in the hands of the governor, the legislature, and even some more surprising actors and entities.[5]

For these states, legislative appointments have become the new normal. But despite that normalcy, these appointment schemes remain curiously unmentioned in the academic literature. Though special elections command respectable attention from political

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[1] Or a random Thursday in Tennessee, a random Saturday in Louisiana, a random Monday in Guam, or another random day of the week when a Tuesday election would intersect with a holiday or religious event.

[2] *Filling State Legislative Vacancies*, NAT'L CONF. ST. LEGIS., https://www.ncsl.org/research/elections-and-campaigns/filling-legislative-vacancies.aspx (last visited Mar. 22, 2020); *see also infra* Part III.

[3] "Temporary state legislative appointment" is the most precise and accurate way of describing the means by which a state legislative vacancy is filled. But because it's a clunky phrase, this Article usually uses "legislative appointment" instead.

[4] *See infra* Section III.B.

[5] *See id.*

science studies, legislative appointments have garnered little attention of their own. They receive a similarly silent treatment from legal scholars and professionals. Notwithstanding the interesting legal questions that arise naturally from these appointment schemes, cases and articles that discuss them at any length are few and far between. This Article endeavors to change that by presenting a comprehensive, but (hopefully) digestible, legal history of legislative appointments.

Accordingly, this Article has several goals: to document the previously untold legal history of legislative appointments, temporary or otherwise; to categorize the different state systems of legislative appointments; and to contextualize legislative appointments within American history. Though these goals have inherent value, the broader goal is to begin a conversation about legislative appointments, by providing academics with a jumping-off point for further research, state policymakers with relevant background information, and courts with a centralized database of legislative intent if they have occasion to interpret the constitutional and statutory provisions providing for legislative appointments.

To meet those goals, this Article proceeds in four parts. Parts I and II tell the legal history of filling legislative vacancies. Part I focuses on the English and colonial history of special elections and the various state constitutional developments that embraced, and then rejected, legislative appointments in the eighteenth and nineteenth centuries. Part II continues the story in the twentieth century, during which twenty-five states—beginning with Nebraska in 1911 and ending with North Dakota in 2000—and five territories adopted legislative appointment schemes. Part III surveys the current landscape of legislative appointment schemes, categorizing the various constitutional and statutory provisions pertaining to legislative appointments. Finally, Part IV puts legislative appointments in proper historical context by explaining why they were adopted, arguing that they are best understood as Progressive Era reforms, and detailing how this greater context enhances our current understanding both of these schemes and the Seventeenth Amendment.

I. SPECIAL ELECTIONS AND THE POST-COLONIAL ADOPTION OF LEGISLATIVE APPOINTMENTS

To appropriately frame the subsequent discussions of legislative appointment schemes as developed during the Progressive Era, Part I recounts the relevant Anglo-American history of filling legislative vacancies. It begins in Section A by detailing the history of special elections—their origin in English history and their subsequent adoption in pre- and post-Revolutionary America through colonial charters, state constitutions, and organic acts. Section B covers the initial adoption of legislative appointments by Kentucky, Maine, Maryland, Massachusetts, and New Hampshire—the first states to adopt such appointments—in the post-colonial era. Section C then explains how this initial adoption led to disastrous, anti-democratic results, and why those five states eventually ditched appointments for special elections throughout the nineteenth century.

A. The Anglo-American History of Special Elections

The modern history of special elections likely dates back to the Reformation Parliament in the early 1530s, when they were an innovation of Thomas Cromwell, a close advisor to King Henry VIII.[6] Though special elections—or by-elections, as they're known elsewhere in the world—are now viewed by some scholars as checks on the government by the public,[7] they certainly were not conceived

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[6] JENNIFER LOACH, PARLIAMENT UNDER THE TUDORS 36 (1991). British historian Albert Pollard similarly concluded that no by-elections were held before 1532. STANFORD E. LEHMBERG, THE REFORMATION PARLIAMENT: 1529–1536 46 (1970).

[7] Two views of special elections dominate the political science literature. *See* Frank B. Feigert & Pippa Norris, *Do By-Elections Constitute Referenda? A Four-Country Comparison*, 15 LEGIS. STUD. Q. 183, 184 (1990). One of them, the "candidate-specific" thesis, posits that special elections "are essentially idiosyncratic contests reflecting the strengths and weaknesses of individual candidates and local party organizations in particular constituencies." *Id.* at 184. The second, the "referendum" thesis, posits that special elections "can be treated as equivalent to public opinion polls, providing a referendum on the government's record, but are more reliable because they involve real rather than hypothetical votes." *Id.* The "candidate-specific" thesis appears to explain the results of American special elections more than the "referendum" thesis does. *Id.* at 195.

with that idea in mind. Instead, King Henry and Cromwell viewed them as means of solidifying support for the monarchy—the ability to issue writs of election was held by the government, and they timed elections to ensure that their allies were ready to stand for the seats when elections were finally called.[8] Indeed, some opponents of the Reformation Parliament explicitly campaigned against the idea of filling vacancies with special elections and urged a return to the pre-Reformation custom where "if a knight or burgess died during parliament, his room[9] should continue void to the end of the same."[10]

In colonial America, the dominant position in governing documents was to provide for special elections, but this was done unevenly and inconsistently. Some colonial charters explicitly contemplated special elections to fill legislative vacancies,[11] others allowed the colonial legislatures to fill the vacancies themselves,[12] and others still did not elaborate on the matter at all.[13] Nonetheless, the available historical records suggest that most American colonies routinely held special elections.[14] After the American Revolution concluded, the new states achieved a greater degree of uniformity—many constitutions first adopted by the states required special

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[8] LEHMBERG, *supra* note 6, at 170; LOACH, *supra* note 6.

[9] Here, and in other texts written in Early Modern English, the use of the word "room" refers to its now-obsolete meaning, "an office or position attributed to a particular person," *Room*, WEBSTER'S NEW INT'L DICTIONARY (3d ed. 1993), *e.g.*, "But when he heard that Archelaus did reign in Judaea in the room of his father Herod, he was afraid to go thither." *Matthew* 2:22 (King James).

[10] LOACH, *supra* note 6.

[11] *See, e.g.*, FUNDAMENTAL ORDERS OF CONNECTICUT of 1639, art. IX; CHARTER OF THE COLONY OF CONNECTICUT of 1662; GEORGIA CHARTER of 1732; CHARTER OF LIBERTIES AND PRIVILEGES of 1683, art. XII; CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS of 1963.

[12] *See, e.g.*, FUNDAMENTAL CONSTITUTIONS OF CAROLINA of 1669, art. XI; CHARTER OF MASS. BAY of 1691; MAYFLOWER COMPACT of 1620; CHARTER OF NEW ENGLAND of 1620; INSTRUCTIONS FOR LORD CORNBURY of 1758.

[13] *See, e.g.*, CHARTER OF DELAWARE of 1701; COMMISSION OF JOHN CUTT of 1680.

[14] *See* CORTLANDT FIELD BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 109–12 (1893).

elections to fill vacancies[15] and a handful provided for some form of legislative appointments to fill vacancies[16]—but many still did not provide any method of filling vacancies at all.[17] These omissions are curious but are understandable in some cases more than others. For example, some of the constitutions drafted shortly after the Declaration of Independence in the summer of 1776 were short, rushed documents that merely provided the bare-bones structure for a government to operate.[18]

As states amended their constitutions—either piecemeal or by adopting entirely new documents following conventions—and as new states were admitted to the Union, a clear preference emerged in favor of requiring special elections. Nonetheless, sharp distinctions developed between the states as to how special elections were ordered. In contrast to the contemporary legal landscape, where the power to issue writs of election is usually held by a state's executive, some states opted to grant the power of issuing a writ to one of the presiding officers of the legislature. This method of legislatively granted writs was preferred by the former colonies, and the states that emerged from them,[19] possibly to distance themselves

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[15] *See* DEL. CONST. of 1776, art. 5; MD. CONST. of 1776, pt. 2, art. VII; N.C. CONST. of 1776, pt. 2, § X; S.C. CONST. of 1776, §§ X, XXVII.

[16] KY. CONST. of 1792, art. I, § 15; MASS. CONST. of 1780, pt. 2, ch. 1, § II, art. IV; ME. CONST. of 1792, art. IV, pt. 2, § 3; MD. CONST. of 1776, art. XIX; N.H. CONST. of 1784, pt. 2.

[17] *See, e.g.*, CONN. CONST. of 1818; N.H. CONST. of 1776; N.J. CONST. of 1776; N.Y. CONST. of 1777; PENN. CONST. of 1776; VT. CONST. of 1777.

[18] *See, e.g.*, MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION-MAKING IN REVOLUTIONARY AMERICA 22–23, 37, 55 (1997) (discussing the temporary nature of the New Hampshire and South Carolina constitutions); ROBERT WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 5 (1990) (noting that the New Jersey Constitution of 1776 was "brief, temporary, and obviously flawed"); W.F. Dodd, *The First State Constitutional Conventions, 1776–1783*, 2 AM. POL. SCI. REV. 545, 546 (1908) ("[I]t should be remembered that the Revolution was a period of civil war, and that the procedure in adopting constitutions may in some cases have been different from what it was[] had the people been establishing governments in a time of peace.").

[19] DEL. CONST. of 1792, art. II, § 13; KY. CONST. of 1792, art. I, § 25; MD. CONST. of 1776, pt. 2, art. VII; N.J. CONST. of 1844, art. IV, § 4, cl. 1; N.C. CONST.

from the colonial practice of granting royal governors and representatives the power to call special elections,[20] but it slowly faded with time. New states uniformly rejected this method, instead empowering the governor to issue writs.[21] And most of the original colonies later transferred the authority to issue writs to their governors after constitutional rewrites, but the old method still exists today in Delaware, Pennsylvania, South Carolina, and Virginia.[22]

The federal track record on special elections—in the form of filling congressional vacancies and in drafting organic acts to organize territories—is somewhat foggier. The framework created in Article II of the United States Constitution seemingly provides a straightforward remedy for a presidential vacancy: the vice president succeeds him.[23] But the Framers deliberately inserted a little-examined provision that also allows Congress to provide for special elections in the event of an extremely unlikely double vacancy of both the president and vice president.[24] In 1792, Congress accepted this invitation, passing a law that required a special election if a double vacancy occurred within the first two and a half years of a president's term.[25] For members of Congress, the

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of 1776, pt. 2, § X; PENN. CONST. of 1790, art. I, § 19; S.C. CONST. of 1790, art I, § 22; VA. CONST. of 1776; W.V. CODE of 1884, ch. IV, § 7.

[20] *See* BISHOP, *supra* note 14, at 109–10 ("For special elections to fill vacancies, the general rule was that writs should be issued by the governor upon address of the assembly.").

[21] *E.g.*, ALA. CONST. of 1819, art. III, § 20; ARK. CONST. of 1836, art. IV, § 9; ILL. CONST. of 1819, art. II, § 11; TENN. CONST. of 1796, art. I, § 12.

[22] DEL. CONST. art. II, § 6; PENN. CONST. art. II, § 2; S.C. CONST. art. III, § 25; VA. CONST. art. IV, § 7.

[23] U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President.").

[24] *Id.* ("[A]nd the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, *or a President shall be elected*." (emphasis added)); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 166–73 (2005) (discussing the "Death, Resignation or Inability" clause of the Constitution).

[25] Act of Mar. 1, 1792, ch. 8, 1 Stat. 239, 240; *see also* AMAR, *supra* note 24, at 170.

Framers rendered a split decision that roughly tracked how each chamber was elected. House vacancies were filled by special elections[26] scheduled by gubernatorially issued writs.[27] Senate vacancies were filled by the state legislature if it was in session; if it wasn't, the governor made a temporary appointment that lasted until the legislature reconvened.[28]

When drafting organic acts, which organized land and people into official territories, Congress legislated inconsistently on how legislative vacancies were to be filled. Many organic acts required special elections, especially towards the end of the nineteenth century.[29] Many other organic acts indirectly provided for special elections by adopting the systems of government created by *previous* acts—like the Northwest Ordinance.[30] But many others

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[26] Despite the Constitution's seemingly strict requirement of using special elections to fill House vacancies, there has been some discussion of how this requirement might be subject to congressional regulation. *See generally* Paul Taylor, *Alternative to a Constitutional Amendment: How Congress May Provide for the Quick, Temporary Filling of House Member Seats in Emergencies by Statute*, 10 J.L. & POL'Y 373 (2002) (arguing that the Constitution provides Congress with the ability to authorize temporary appointments to fill vacancies in the House).

[27] U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.").

[28] *Id.* cl. 2 ("[A]nd if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.").

[29] *See, e.g.*, Act of Mar. 3, 1863, ch. 117, 12 Stat. 808 (organizing Idaho Territory); Montana Organic Act, ch. 95, 13 Stat. 85; Ashley Bill, ch. 235, 15 Stat. 178 (organizing Wyoming Territory); Oklahoma Organic Act of 1890, ch. 182, 26 Stat. 81.

[30] Act of May 7, 1800, ch. 41, 2 Stat. 58, 59 (creating the Indiana Territory) ("And be it further enacted, That there shall be established within the said territory a government in all respects similar to that provided by the ordinance of Congress, passed on the thirteenth day of July one thousand seven hundred and eighty-seven, for the government of the territory of the United States northwest of the river Ohio."). All told, the government created for the Northwest Territory ended up being incorporated, directly or indirectly, to the Alabama, Illinois, Indiana, Michigan, and Mississippi Territories. Act of Mar. 3, 1817, ch. 59, 3 Stat. 371; Act of Feb. 3, 1809, ch. 13, 2 Stat. 514; Act of Jan. 11, 1805, ch. 5, 2 Stat. 309;

failed to provide a mechanism for most legislative vacancies. Instead, they merely provided for a special election if a district failed to elect a legislator as the result of a tied vote.[31] What explains this discrepancy? The likeliest answer seems to be the length of territorial legislators' terms. Organic acts creating territorial legislatures with terms longer than one year almost always spelled out how vacancies were to be filled, but when the terms were just one year, organic acts only did so about half of the time.[32]

To pick up the slack, some (but not all) territorial legislatures adopted statutes regarding legislative vacancies, which were then crystallized in their constitutions upon statehood.[33]

Act of Apr. 7, 1798, ch. 28, 1 Stat. 549. The Northwest Ordinance was not the only organic act that was effectively incorporated to newly organized territories; the territorial governments created by the Missouri Territory Act and the Texas and New Mexico Act were applied to the Arkansas and Arizona Territories, respectively. Arizona Organic Act, ch. 56, 12 Stat. 664; Act of Mar. 2, 1819, ch. 49, 3 Stat. 493.

[31] *E.g.*, Act of Apr. 20, 1836, ch. 54, 5 Stat. 10 (establishing the Wisconsin Territory) ("The Governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie.").

[32] *Compare, e.g.*, Utah Territory Organic Act, ch. 51, 9 Stat. 453 (creating house of representatives elected to one-year terms and not providing for filling legislative vacancies), *with* Act of June 4, 1812, ch. 95, 2 Stat. 743 (organizing Missouri Territory) (creating house elected to two-year terms and providing for filling legislative vacancies with special elections).

[33] *Compare, e.g.*, Act of Apr. 20, 1836, ch. 54, 5 Stat. 10, 12 (1836) ("[T]he Governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie."), *with* Act of Jan. 18, 1838, ch. 69, § 19, 1837 Wis. Terr. Sess. Laws 404, 412–13 ("[W]hen any vacancy shall happen in the office of members of the council or house of representatives of the legislative assembly by death, resignation, or otherwise, the governor shall issue a writ of election."), *and* WIS. CONST. art. IV, § 14 (1848) ("The governor shall issue writs of election to fill such vacancies as may occur in either house of the Legislature."). Utah presented an unusual case. Prior to the state's organization under the Utah Territory Organic Act, it organized itself as the provisional State of Deseret, which was never recognized by the federal government. However, during a brief period of time, Deseret operated as a *de facto* state, with a functioning government. JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE 5–6 (2011). The Deseret General Assembly passed legislation providing for special elections to fill legislative vacancies, *see* H. JOURNAL, 1st Terr. Leg., 1st Reg. Sess. 163 (Utah 1851), which

B. The Initial Adoption of Legislative Appointments

Several states opted for a different approach, however. In Maryland's first constitution, adopted in 1776, it created a bicameral legislature. The House of Delegates was elected in a manner consistent with what we would expect today, with vacancies filled by special elections.[34] The Senate, however, was elected differently. The voters of each county would elect two electors,[35] who would then meet in Annapolis to elect fifteen state senators—six from the Eastern Shore and nine from the rest of Maryland.[36] If any vacancy occurred, the state senate had the power to fill it.[37]

Kentucky opted for a nearly identical system. At Kentucky's First Constitutional Convention, George Nicholas—an influential delegate who would later serve as the state's first attorney general—advocated for the adoption of the Maryland model.[38] He ended up getting his way. The Kentucky Constitution of 1792's provision for senate elections ended up mirroring, almost verbatim, the Maryland Constitution's.[39] The method of filling legislative vacancies was

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was then incorporated into the territorial laws, *see* Act of Oct. 4, 1851, 1851 Utah Terr. Sess. Laws 205.

[34] MD. CONST. of 1776, art. II.

[35] *Id.* art. XIV.

[36] *Id.* art. XV.

[37] *Id.* art. XIX.

[38] JOAN WELLS COWARD, KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING 28 (1979).

[39] *Compare* MD. CONST. of 1776, arts. XIV–XV ("All persons, qualified as aforesaid to vote for county Delegates, shall . . . elect, *viva voce*, by a majority of votes, two persons for their respective counties . . . to be electors of the Senate . . . . That the said electors of the Senate meet at the city of Annapolis . . . shall proceed to elect, by ballot, either out of their own body, or the people at large, fifteen Senators . . . men of the most wisdom, experience and virtue, above twenty-five years of age, residents of the State above three years next preceding the election."), *with* KY. CONST. of 1792, art. I, §§ 10, 12 ("All persons qualified to vote for representatives shall . . . elect by ballot, by a majority of votes, as many persons as they are entitled to have for representatives for their respective counties, to be electors of the Senate . . . . The electors of the Senate shall meet at such place as shall be appointed for convening the Legislature . . . and they, or a majority of them, so met, shall proceed to elect by ballot, as Senators, men of the most wisdom, experience, and virtue, above twenty-seven years of age, who shall

also nearly identical to Maryland's, in which state house vacancies were filled by special election and state senate vacancies were filled by the senate itself.[40]

Massachusetts's first constitution, which was drafted in 1778, also contained an indirectly elected senate, but one constructed quite differently from Maryland's,[41] in which the state house would fill any vacancy from a list of candidates nominated by the voters.[42] But the 1778 constitution was overwhelmingly rejected by the voters,[43] in part because of the proposed method of electing the senate,[44] and the constitution ultimately adopted by the next convention provided

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have been residents of the State above two whole years next preceding the election.").

[40] KY. CONST. of 1792, art. I, §§ 15, 25 ("That in case of refusal, death, resignation, disqualification, or removal out of this State of any Senator, the Senate shall immediately thereupon, or at their next meeting thereafter, elect, by ballot, in the same manner as the electors are herein directed to [choose] Senators, another person in his place, for the residue of the said term of four years . . . . When vacancies happen in the House of Representatives, the Speaker shall issue writs of election to fill such vacancies.").

[41] The 1778 proposal was quite confusing. It provided for multiple rounds of elections, in between which the legislature would pare down the list of eligible candidates, and then granted the legislature broad power to reject the people's choice as "unduly elected or not legally qualified," thereby allowing it to fill the seat itself. MASS. CONST. art. IX (proposed 1778).

[42] *Id.* art. XII ("Whenever any person, who may be chosen a member of the Senate, shall decline the office, to which he is elected, or shall resign his place, or die, or remove out of the State, or be any way disqualified, the House of Representatives may, if they see fit, by ballot, fill up any vacancy occasioned thereby, confining themselves in the choice to the nomination list for the district, to which such member belonged, whose place is to be supplied, if a sufficient number is thereon for the purpose; otherwise the choice may be made at large in said district.").

[43] SAMUEL ELIOT MORISON, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS 16 (1917).

[44] *See The Essex Result*, *in* THE REVOLUTION IN AMERICA 1754–1788: DOCUMENTS AND COMMENTARIES 446, 447 (J. R. Pole ed. 1970) ("That the mode of election of Senators pointed out in the Constitution is exceptionable."). At the town meetings when the 1778 constitution was voted on, many towns drafted responses to the proposal. "The Essex Result," drafted by voters in Essex County, was the most influential of these responses and "helped lay the foundation for the Constitution of 1780." LAWRENCE M. FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 9 (2011).

for a directly elected senate.[45] For state senate vacancies, the 1780 constitution provided that the entire state legislature would fill the vacancy by selecting from among the unsuccessful candidates for that seat at the last election.[46] (The 1780 constitution did not mention how state house vacancies were filled, but by the early nineteenth century, an informal custom had developed of conducting special elections in very limited circumstances, though they left the seat vacant more often than not.[47])

These provisions were largely copied verbatim by New Hampshire and Maine over the next half-century.[48] In 1784, when New Hampshire drafted its second constitution, it largely based it

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[45] MASS. CONST. of 1780, pt. 2, ch. 1, § II, art. I.

[46] *Id.* art. IV ("The members of the house of representatives, and such senators as declared elected, shall take the names of such persons as shall be found to have the highest number of votes in such district, and not elected, amounting to twice the number of senators wanting, if there be so many voted for; and out of these shall elect by ballot a number of senators sufficient to fill up the vacancies in such district; and in this manner all such vacancies shall be filled up in every district of the commonwealth; and in like manner all vacancies in the senate, arising by death, removal out of the state, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen.").

[47] *In re* Opinion of Justices, 20 Mass. (3 Pick.) 517, 519–20 (1826).

[48] For a deeper dive into how vacancies in the Maine, Massachusetts, and New Hampshire State Senates were filled—and, more broadly, how the senates were elected—see Tyler Yeargain, *New England State Senates: Case Studies for Revisiting the Indirect Election of Legislators*, 19 U.N.H. L. REV. (forthcoming Spring 2021). To some extent, Connecticut adopted a similar method in its 1818 constitution of filling vacancies caused by a failure to elect—specifically, in the context of a tied election. CONN. CONST. of 1818, art. III, § 6. While this Article is not *generally* concerned with how tied elections are resolved, the systematic operation of this provision could have produced vacancies comparable to the failure to elect in Maine, Massachusetts, and New Hampshire. And it was somewhat likely that this would happen. Connecticut elected its state senate statewide, not by district, with the top twelve vote-getters winning seats, *id.* §§ 4, 6, which theoretically made it substantially likelier than usual that a tied election would result. However, in the ten-year period between 1818, when the constitution was adopted, and 1828, when the constitution was amended to provide for district-based elections, no such ties occurred and the house accordingly never picked a member of the senate. *See* Yeargain, *supra*.

on Massachusetts's.[49] Accordingly, its provision regarding senate vacancies was virtually identical to Massachusetts's,[50] though it did provide for special elections for state house vacancies.[51] Similarly, when Maine separated from Massachusetts and was admitted to the Union as a separate state in 1819, it too used the 1780 Massachusetts Constitution as a starting point and adopted a nearly identical provision regarding state senate vacancies[52] while requiring special elections for state house vacancies.[53]

Finally, there is the case of Arkansas, which sits uncomfortably in this discussion. Confusion over the interaction between the constitution's original requirement that special elections be held to fill legislative vacancies and an 1893 constitutional amendment—which allowed the governor to fill vacancies "in any state, district, county, or township office"—apparently resulted in the governor of Arkansas routinely filling legislative vacancies by appointment.[54] However, in 1906, the Supreme Court of Arkansas invalidated the 1893 amendment for failure to actually receive a majority of all ballots cast.[55] But even though the amendment was struck from the constitution, governors continued filling legislative vacancies by appointment—and even acknowledged that their actions were illegal.[56] A constitutional amendment on the ballot in 1930 would have clarified that the governor was required to fill legislative

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[49] SUSAN E. MARSHALL, THE NEW HAMPSHIRE STATE CONSTITUTION: A REFERENCE GUIDE 1 (2004).

[50] *See* N.H. CONST. pt. 2, art. 14; *see also* MARSHALL, *supra* note 49, at 153 ("The 1784 version of this article was almost the same as the corresponding provision in the 1780 Massachusetts Constitution.").

[51] N.H. CONST. pt. 2 (1784) ("All intermediate vacancies in the house of representatives, may be filled up from time to time, in the same manner as annual elections are made.").

[52] ME. CONST. art. IV, pt. 2, § 3 (1819); MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE 4–5, 71–72 (1992).

[53] ME. CONST. art. IV, pt. 1, § 6 (1819).

[54] David Y. Thomas, *Amending a State Constitution by Custom*, 23 AM. POL. SCI. REV. 920, 921 (1929); *e.g.*, S. JOURNAL, 31st Leg., 1st Reg. Sess. 3 (Ark. 1897) (noting that the governor had appointed "Charles H. Halley of the Fifteenth District to fill a vacancy caused by the resignation of [Senator] George C. Shell").

[55] *See* Rice v. Palmer, 96 S.W. 396, 400 (Ark. 1906).

[56] Thomas, *supra* note 54.

vacancies by special election, but it was defeated by the voters.[57] The next year, perhaps in light of the failed amendment, one of the appointments was challenged in court. The challenge was somewhat indirect; a taxpayer challenged the payment of a salary to an appointed state senator, arguing that he had been illegally appointed. However, the state supreme court dismissed the suit and sidestepped the question altogether, holding that the taxpayer had brought the suit in equity when he should've brought it in law, leaving the constitutional question unresolved.[58] The process continued for at least the next decade.[59] Though it is unclear exactly when the process ceased, it was likely abolished no later than 1945, when there is record that a special election to fill a legislative vacancy was held.[60]

C. The Downfall of Legislative Appointments

These provisions didn't last long, however, and went *disastrously*. Kentucky's was the first to fall with the adoption of its second constitution in 1799, only seven years after its first. The 1792 constitution contained a *de facto* sunset provision, which scheduled a referendum for a new constitutional convention at the regularly scheduled 1797 election.[61] If the voters supported a convention at that election—and again at the 1798 election—then one would be

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[57] *See* H. JOURNAL, 48th Leg., 1st Reg. Sess. 26–27 (Ark. 1931) (discussing Proposed Amendment No. 24, which would have required the governor "to fill vacancies in offices provided for by Article VII of the Constitution, required by the Constitution to be filled by special elections").

[58] Davis v. Wilson, 35 S.W.2d 1020, 1024 (Ark. 1931).

[59] *See* H. JOURNAL, 52nd Leg., 1st Reg. Sess. 6 (Ark. 1939) (noting when State Representative B.F. McGraw died, "there now remains insufficient time within which to hold a special election to fill the vacancy before" the special session convened, and "unless temporary appointment is made to fill said vacancy, said county will be without representation," and appointing G.D. Smith to fill the vacancy).

[60] H. JOURNAL, 55th Leg., 1st Reg. Sess. 165 (Ark. 1945) ("Mrs. Leslie W. Buchanan has been duly elected at a special election in Nevada County, Arkansas, to fill the death of her husband, [State Representative-elect Buchanan].").

[61] KY. CONST. of 1792, art. XI, § 1.

held.[62] It was an invitation that Kentuckians overwhelmingly accepted. The government created by the 1792 constitution was widely viewed as anti-democratic—*especially* the state senate.[63] The state house yielded to public pressure, repeatedly voting in favor of a new convention even in advance of the sunset provision.[64] But the senate rejected each of these efforts, in part because it wanted to preserve its indirect election.[65] However, the sunset provision ended up winning out, and a convention was called for 1799. At the convention, delegates overwhelmingly supported making the senate directly elected.[66] Though the delegates initially thought that filling senate and house vacancies should occur by different procedures,[67] the adopted constitution provided that both would be filled by special elections.[68]

The Maryland State Senate eventually experienced a similar overhaul, largely due to public opposition to its inherently undemocratic nature. Its indirect election effectively operated as a brutally effective gerrymander for the Whig Party. The Whigs were frequently able to win a majority on the electoral college by running up the score in the state's least populated, and therefore overrepresented, counties—even as they lost the statewide vote. When they won a majority on the electoral college, they could elect *every* member of the senate, an opportunity they usually took advantage of.[69] And the method of filling vacancies was used to

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[62] *Id.*

[63] COWARD, *supra* note 38, at 102–03.

[64] *Id.* at 102–03, 106.

[65] *Id.* at 103. "Indirect" election undersells the point—at that time, a majority of the senate had been elected by other members of the senate, not the electors. At best, that meant that a majority of the senate had been *indirectly* elected. *Id.*

[66] *Id.* at 148.

[67] *Id.* at 147. One of the initial proposals was that the Kentucky House of Representatives ought to be tasked with filling state senate vacancies, *id.*, perhaps inspired by how vacancies in the Massachusetts and New Hampshire State Senates were filled.

[68] KY. CONST. of 1799, art. II, § 30 ("The general assembly shall regulate by law by whom and in what manner writs of election shall be issued to fill the vacancies which may happen in either branch thereof.").

[69] A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 347–48 (1962). Only once was

similar effect; during one period of time, fourteen out of fifteen senators had been elected to their positions not by the *electors*, but by their *colleagues*.[70] And because the legislature elected the governor, a legislature elected by a minority was able to control virtually all mechanisms of state government.[71]

The 1836 election provides a practical example of how badly this worked. Democrats won fifty-three percent of the statewide vote, but because of malapportionment, only elected nineteen out of forty electors, which would have allowed the Whigs to elect a unanimous Whig senate.[72] The Democratic electors refused to allow that to happen and absconded, denying the electoral college the constitutionally mandated quorum.[73] Negotiations commenced, and the Democratic electors refused to meet unless the Whig electors promised to elect a Democratic senate majority.[74] In their absence, however, not only could the senate not be elected, but neither could the governor, effectively grinding the state to a halt.[75] The public's patience wore out, and at the following month's state house elections, the Whigs won an overwhelming victory.[76] The electors conceded and returned to the state capital, providing the requisite quorum, and a unanimous Whig senate was elected.[77] But though the Democrats lost the battle, they won the war. The new Whig legislature embraced vast constitutional reforms, including a

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the Maryland State Senate not unanimously composed of members of one party: in 1826, when the National Republicans won a majority on the electoral college. Six of the National Republican electors joined with the fourteen Federalist electors to elect eleven National Republicans and four Federalists to the Maryland Senate. Bernard C. Steiner, *The Electoral College for the Senate of Maryland and the Nineteen Van Buren Electors*, *in* AMERICAN HISTORICAL ASSOCIATION ANNUAL REPORT FOR 1895 134 (Washington, D.C., Government Printing Office 1896).

[70] Hagensick, *supra* note 69.

[71] *Id.*

[72] *Id.* at 350.

[73] *Id.*

[74] *Id.* at 350–51.

[75] *Id.* at 351.

[76] *Id.* at 353.

[77] *Id.* at 356.

popularly elected governor and senate and the filling of senate vacancies by special election.[78]

In Massachusetts, the issue of filling senate vacancies was intertwined with the method by which senators were elected—in the 1780 constitution, senate candidates were only elected if they received a majority of the vote.[79] If no candidate in a particular district received a majority, then no candidate was elected, creating a vacancy that the legislature then filled.[80] These vacancies, which *only* occurred because of a failure to win a majority of the vote, sometimes resulted in the legislature picking between a quarter and three quarters of the entire senate[81] and could sometimes be enough

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[78] MD. CONST. § 6 (amended 1837) ("In case any person who shall have been chosen as a senator shall refuse to act, remove from the county or city, as the case may be, for which he shall have been elected, die, resign, or be removed for cause, or in case of a tie between two or more qualified persons in any one of the counties or in the city of Baltimore, a warrant of election shall be issued by the president of the senate for the time being for the election of a senator to supply the vacancy, of which ten days' notice at the least, excluding the day of notice and the day of election, shall be given."); Hagensick, *supra* note 69, at 357.

[79] MASS. CONST. pt. 2, ch. 1, § III, art. II (1780).

[80] *Id.* art. IV.

[81] Samuel Shapiro, *The Conservative Dilemma: The Massachusetts Constitutional Convention of 1853*, 33 NEW ENG. Q. 207, 209 (1960); 1 1853 MASS. CONST. CONVENTION, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 282 (Boston, White & Potter 1853) (remarks of Delegate George N. Briggs) ("During the last few years, from sixteen to thirty members of the Senate have been elected by the legislature . . . without a single exception, so far as I can recollect, these vacancies in the Senate are filled from candidates agreeing in politics with the majority of the legislature, without any reference to the popular vote."). Because of the infrequency with which house and senate journals were printed before the 1860s, it is difficult to estimate the frequency with which vacancies occurred in the Massachusetts Senate. However, the available data show some rough trendlines. In the 1780s and 1790s, prior to the entrenchment of political parties, about a quarter of the senate, on average, was elected by the General Court. This number steadily decreased around the turn of the century as the Democratic–Republicans and Federalists established themselves, and rarely exceeded ten percent, except during the early 1820s and 1830s, when short-lived third parties emerged in the state. Like in Maine and New Hampshire, the success of the Liberty and Free Soil parties in the 1840s and 1850s, respectively, drove senate vacancies to unprecedented levels—at several

to allow a party to be handed control of the senate despite losing the popular vote.[82] Accordingly, the dominant political parties engaged in gamesmanship with each other, manipulating the number of candidates in key districts to deprive their opponents of majorities, thereby allowing vacancies to be filled by the legislative majority.[83]

Following decades in which the Whig Party had blocked democratic reforms, a constitutional convention was convened in 1853.[84] Though the delegates at the convention briefly discussed the idea of changing the method of filling senate vacancies[85] and extensively debated the merits of ending the majority requirement for legislative elections,[86] neither issue was included in any of the proposals submitted to voters.[87] Several years later, the Whig

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points during those two decades, more than half of the senate was selected by the General Court. But by the 1860s, the Republican Party had come to dominate the state, and senate vacancies decreased to zero. *See* Yeargain, *supra* note 48.

[82] Shapiro, *supra* note 81, at 209 n.7 ("In 1843 the Whigs filled 15 vacancies this way, thus gaining control of the Senate even though they had polled fewer votes than the Democrats in the state that year.").

[83] *Id.* at 389–90 (remarks of Delegate R.H. Dana, Jr.) ("Under the majority system, the dominant party will say, we will not listen to you; you cannot elect any one. The worst that can happen is a non-election. Our adversaries shall not succeed, and you will not succeed. We will go to the polls and we will keep you there . . . . The majority say 'we will not listen to you—you cannot alter the result of the election, for at best you can only make a non-election.' This result follows: there is no election, and consequently we have towns and representative districts in this Commonwealth deprived of their representation. I do not think it is the third party which keeps them unrepresented; I regard it as the dominant interest in one of the two great parties which keeps them unrepresented.").

[84] Yan Li, The Transformation of the Constitution of Massachusetts, 1780–1860 8–9 (1991) (unpublished Ph.D. dissertation, University of Connecticut) (on file with the University of Connecticut).

[85] *E.g.*, 1 1853 MASS. CONST. CONVENTION, *supra* note 81, at 178 ("Ordered, That the Committee, to whom was referred so much of the Constitution as relates to the Frame of Government, and mode of settling Elections in the Legislature, consider the expediency of amending the Constitution, as to provide therein for elections to fill all vacancies which may occur in both branches of the legislature by reason of death or resignation of members thereof, or from any other cause, not otherwise provided for.").

[86] *Id.* at 235–317, 372–435.

[87] *See* 3 1853 MASS. CONST. CONVENTION, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH

legislature successfully amended the state constitution to allow legislators to win elections with pluralities of the vote.[88] In 1859, the Massachusetts legislature, then dominated by Republicans,[89] put an amendment on the ballot for the following year that successfully ended the legislature's ability to fill senate vacancies and instead provided for special elections.[90]

Maine and New Hampshire eventually followed Massachusetts's lead in requiring special elections for senate vacancies, but not until the end of the century. The changes were driven both by keen political strategy and by a desire to make the legislature more democratic. The practical consequence of requiring the legislature to pick from previously unsuccessful candidates when filling a vacancy was that it effectively handed control of the seat to the opposing political party. In New Hampshire, legislators apparently found a clever way around this—rather than selecting the second-place candidate from the previous election, they would select someone who ran as a third-party candidate and who had received only a handful of votes.[91] And New Hampshire, like

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1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 737–52 (Boston, White & Potter 1853) (providing the text of the eight propositions submitted to the voters).

[88] MORISON, *supra* note 43, at 64; *see also* MASS. CONST. art. XIV (1855) ("In all elections of civil officers by the people of this commonwealth, whose election is provided for by the constitution, the person having the highest number of votes shall be deemed and declared to be elected."); FRIEDMAN & THODY, *supra* note 44, at 168 (discussing the provision in greater detail).

[89] TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS & THE POLITICS OF THE 1850S 248 (1992); MICHAEL J. DUBIN, PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY, 1796–2006 92–93 (2007) (noting that Republicans won a majority in both chambers of the Massachusetts General Court in 1856, which they held for the remainder of the century).

[90] MASS. CONST. amend. XXIV (1860); *see* Resolution of Apr. 4, 1860, ch. 65, 1860 Mass. Sess. Laws 199. "It is not clear whether the Amendment means that the Senators have the power still, if they so desire, to resort to the old method of filling vacancies, or whether they can refuse to fill a vacancy if they choose not to." FRIEDMAN & THODY, *supra* note 44, at 174.

[91] *See* N.H. CONST. CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE, JANUARY, 1889 26, 140–41, 143 (John B. Clarke 1889) [hereinafter 1889 CONSTITUTIONAL CONVENTION JOURNAL]. William C. Todd, a delegate from Rockingham County to the New

Massachusetts, required state senate candidates to receive a majority of the vote in order to win under the 1784 constitution,[92] allowing the legislature to select senators when no candidate received a majority.

This majority requirement, combined with the governor's constitutional power to examine election returns and issue summonses to the winners,[93] led to an explosive situation in 1875. In that year's March legislative elections,[94] it appeared that Republicans would win a narrow majority in the New Hampshire Senate. In the Second and Eleventh Districts, their candidates had won the second-most votes, but no one in either district had received

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Hampshire Constitutional Convention in 1889 and the author of the constitutional amendment to provide for special elections, provided colorful commentary to illustrate this point:

> As it is now, in case of a vacancy by death we have only two courses: we must choose the candidate who had the next highest number of votes, and in that case he would be of the opposite political party, and the district would be misrepresented; or we must select an individual who had one, two, three, or four votes cast for him, perhaps in joke, and who would represent nobody . . . . In 1871 there was an election where Alvah Smith had four votes, Albina Hall 2,567 votes, and Samuel P. Thrasher 2,595. Samuel P. Thrasher died, and the Legislature had to fill the vacancy from one of the two other men. Albina Hall had the next highest number of votes, but he was a Republican, of the opposite party. They did not select him, and if they had he would not have represented the district; but they selected Alvah Smith, in accordance with a bargain, as was generally believed . . . . I do not think the result showed that a single man who voted for that Alvah Smith but felt ashamed of his action, as I understood the gentleman from Dover to state the other day. He represented nobody, and nobody was proud of him.

Id. at 140–41.

[92] N.H. CONST. pt. 2 (1784) ("The senate shall be final judges of the elections, returns, and qualifications of their own members . . . and shall . . . determine and declare, who are elected by each district to be senators by majority of votes; and in case there shall not appear to be the full number returned elected by a majority of votes for any district," the legislature shall fill the vacancies.).

[93] N.H. CONST. of 1792, pt. 2, art. XXXIII.

[94] Under the original New Hampshire Constitution, senators were elected to one-year terms in March. *See id.* arts. XXV, XXVII.

a majority.[95] Accordingly, the entire legislature would have selected the winners. Because the Republicans won an absolute majority in the much larger New Hampshire House of Representatives, they had the numbers to elect their senate candidates.

However, outgoing Governor James Weston, a Democrat, invalidated votes in both districts on grounds that several candidates listed, including the Republican candidate in the Second District, hadn't appeared on the ballot with their "Christian name[s]."[96] After doing so, the results were recalculated, and the Democratic candidates were then determined to have "won" a majority of the validly cast votes and were declared the winners.[97] When the senate was inaugurated later that year, the 7–5 Democratic majority ratified the results.[98] The Republicans in the house protested[99] and asked the state supreme court to intervene, which it declined to do.[100] Voters elected a Republican senate majority the next year and, in 1879, elected Nathaniel Head, one of the jilted Republican senate candidates, to the governorship.[101]

At the 1876 Constitutional Convention, the delegates attempted to amend the method of filling senate vacancies with one proposal to instead grant the power to fill vacancies to the state

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[95] *See In re* Opinion of the Justices, 56 N.H. 574, 574–75 (1875) (showing tables of election results).

[96] MARK WAHLGREN SUMMERS, PARTY GAMES: GETTING, KEEPING, AND USING POWER IN GILDED AGE POLITICS 575–76 (2005).

[97] *Id.*

[98] *See* S. JOURNAL, Gen. Sess. 9–14 (N.H. 1875).

[99] H. JOURNAL, Gen. Sess. 280–82, 346 (N.H. 1875) (condemning the governor's actions as "an overt encroachment of the executive department upon the legislative branch of government; [] subversive and destructive of the separate and independent working and existence of a free and essential power of the government; and [] a defeat and subversion of the elective rights guaranteed by the constitution to the qualified voters of this state").

[100] *In re* Opinion of the Justices, 56 N.H. 574, 575–76 (1875).

[101] *Compare* S. JOURNAL, Gen. Sess. 10–11 (N.H. 1875) (disqualifying votes for state senate candidate Nathaniel Head in 1875), *with* H. JOURNAL, Gen. Sess. 241 (N.H. 1879) (collecting vote totals in the 1879 gubernatorial election and noting that "Natt Head, having a majority of all the votes cast, is elected governor for the ensuing two years").

representatives who represented the senate district.[102] But this effort proved unsuccessful, and so at the 1889 Constitutional Convention, a delegate proposed amending the constitution to require a special election if a senator vacated his seat while in office.[103] Following some initial opposition to the idea,[104] the convention adopted the proposal, which was approved by voters with seventy-four percent of the vote.[105] The legislature retained the ability to elect senators if no candidate received a majority until 1912, when the constitution was amended again to simply require a plurality.[106] After this, the legislature theoretically retained the ability to fill senate vacancies if the person who received a plurality of the vote wasn't qualified,[107] but this possibility was removed when the constitution was amended in 1968 to require a new election.[108] Today, the legislature still

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[102] N.H. CONST. CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE, DECEMBER, 1876 174 (Edward A. Jenks 1877).

[103] 1889 CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 91, at 144; *see* N.H. CONST. pt. 2, art. 33 ("[A]ll vacancies in the senate arising by death, removal out of the state, or otherwise, except from failure to elect, shall be filled by a new election by the people of the district, upon the requisition of the governor, as soon as may be after such vacancies shall happen.").

[104] N.H. CONST. pt. 2, art. 33.

[105] N.H. SEC'Y OF STATE, THE NEW HAMPSHIRE MANUAL OF USEFUL INFORMATION 349 (John B. Clarke 1889).

[106] N.H. CONST. pt. 2, art. 34 ("And in case there shall not appear to be a senator elected, by a plurality of votes, for any district, the deficiency shall be supplied" by joint convention of the house and senate.).

[107] *See id.*

[108] N.H. DEP'T OF STATE, MANUAL FOR THE GENERAL COURT: 1969 801 (41st ed. 1969); *see also* N.H. CONST. pt. 2, art. 34 ("[A]nd in case the person receiving a plurality of votes in any district is found by the Senate not to be qualified to be seated, a new election shall be held forthwith in said district."). The 1968 amendment came after the Republican majority in the state senate disqualified two Democratic state senators in 1965 after concluding that they had not been residents of New Hampshire for the requisite period. Brown v. Lamprey, 206 A.2d 493, 494 (N.H. 1965). Rather than declaring the seats vacant and allowing the governor to call special elections to fill the seats, the Republican majority instead declared the votes for the disqualified senators invalid, which meant that their Republican opponents had won a majority of the votes for *qualified* candidates and were entitled to their seats. *Id.* at 495. The New Hampshire Supreme Court refused to intervene. *Id.* at 496.

theoretically retains the ability to fill a senate vacancy where "there shall not appear to be a senator elected, by a plurality of the votes," though it is unclear when this provision would come into effect short of a tied vote.[109]

Maine experienced similar democratic upheaval that ultimately resulted in substantial constitutional changes. The majority-vote requirement caused a considerable number of legislative vacancies[110]—for state house vacancies caused by failure to elect, the constitution simply bounced the election back to the voters for reconsideration, who very frequently were unable to consolidate behind a candidate. In some cases, the voters voted as many as *thirteen or fourteen times* and still were unable to elect a candidate with a majority of the vote.[111]

Moreover, like in New Hampshire, the parties were incentivized to manipulate the rules to their own advantage. In 1854, only thirteen of thirty-one members of the state senate were elected by majority vote, but nonetheless attempted to organize themselves.[112] Though they were faced with eighteen vacancies in their body, they refused to meet with the Maine House of Representatives to fill all of them; instead, they only consented to filling five vacancies.[113] The house refused to go along, insisting instead that the senate consent to filling *all* of the vacancies, which the senate refused to do.[114] The situation was only resolved when the house of representatives requested a

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[109] *See* N.H. CONST. pt. 2, art. 34.

[110] *E.g.*, *In re* Opinion of the Justices of the Supreme Judicial Court given under the Provisions of Article VI, Section 3 of the Me. Constitution, 162 A.3d 188, 210 (Me. 2017).

[111] S. 24-38, 1st Sess. 8 (Me. 1844) ("We have all of us seen that such has been the state of political parties in very many districts, that it is often times difficult, if not impossible, to elect a choice. Some districts met last year, thirteen or fourteen times, without effecting a choice, and during the present winter, some districts are not yet represented, although six successive meetings have been held for the purpose of effecting a choice.").

[112] *In re* Opinion of the Justices, 35 Me. 563, 563 (1854); S. JOURNAL, 33rd Leg., 1st Reg. Sess. 4–5 (Me. 1854) [hereinafter 1854 SENATE JOURNAL].

[113] *Opinion of the Justices*, 35 Me. at 564; 1854 SENATE JOURNAL, *supra* note 112, at 11.

[114] 1854 SENATE JOURNAL, *supra* note 112, at 14–17, 19–24.

formal opinion from the Supreme Judicial Court, which ultimately concluded that the senate had acted unlawfully.[115]

Following this and other controversies, the majority vote requirement was altogether abolished in 1875.[116] A constitutional commission convened in 1875 recommended its abolition, and the legislature quickly moved to adopt it.[117] The vacancy-filling procedure, which effectively obligated the majority to surrender a seat to the minority party if a vacancy occurred,[118] was similarly abolished in 1899,[119] when Republicans successfully gerrymandered themselves into a unanimous, 31–0 majority in the state senate and a commanding 126–25 majority in the state house.[120]

II. THE TWENTIETH CENTURY ADOPTION OF LEGISLATIVE APPOINTMENTS

At the end of the nineteenth century, almost every state required special elections to fill legislative vacancies.[121] Though the

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[115] *Opinion of the Justices*, 35 Me. at 574–75.

[116] TINKLE, *supra* note 52, at 71. After this change, it does not appear that the Maine Legislature filled any midsession or intrasession vacancies itself. *See* Yeargain, *supra* note 48.

[117] S. JOURNAL, 54th Leg., Gen. Sess. 263, 268, 287 (Me. 1875).

[118] The presiding officer of the Maine Senate basically said as much when explaining the purpose of the constitutional amendment to provide for special elections: "Under the constitution as it exists at the present, upon the death of a senator, the vacancy must be filled by a choice from one of the next two candidates. Upon the death of a senator from one political party it would then be necessary to choose a member from the other party to fill his place." Me. Leg. Record, 68th Leg., Reg. Sess. 422 (Mar. 25, 1897) (statement by the chair).

[119] S.D. 207, 68th Leg., Reg. Sess. (Me. 1897).

[120] DUBIN, *supra* note 89, at 81; Peter H. Argersinger, *All Politics Are Local: Another Look at the 1890s*, 8 J. GILDED AGE & PROGRESSIVE ERA 7, 21 (2009).

[121] It appears that only Vermont lacked any method of filling legislative vacancies. The state initially had a unicameral legislature and added a senate in 1836. In the constitutional amendment creating the senate, the legislature was granted the ability to determine how vacancies were filled. VT. CONST. of 1836, ch. 2, § 37. However, the legislature does not appear to have ever done so. Additionally, the constitution made no mention of filling state house vacancies, and contemporaneous accounts concluded that it was impossible to fill them. *See*

frequency with which special elections *actually* occurred is questionable,[122] the requirement was nonetheless crystallized in state constitutions, state statutes, or both. This legal distinction—namely, whether the requirement of special elections originated in a constitution or a statute—ended up mattering a great deal in the early twentieth century. States that had only a statutory requirement of special elections had a much easier time adopting legislative appointment schemes. This Part summarizes the history of legislative appointment schemes in the nineteenth century. Section A describes the most productive period of time in which states adopted legislative appointments—eleven states did so from 1911 to 1936, a period of time that included the twilight of the Progressive Era. A decade-long lull occurred between this period of growth and the next—summarized by Section B—which began in the mid-1940s and continued into the mid-1960s. After that period, only four states adopted legislative appointments, with North Dakota in 2000 as the most recent. At the same time, five of the six current territories of the United States also adopted legislative appointments, either through revisions of their organic acts or territorial constitutions approved by Congress. The territorial adoption of legislative appointments is described in Section C.

A. The Re-Adoption of Legislative Appointments

The switch to temporary legislative appointments is somewhat intertwined with the ratification of the Seventeenth Amendment to the Constitution, which provided for the direct election of

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COMM. TO PREPARE & PRESENT AMENDMENTS TO THE CONSTITUTION, PROPOSALS OF AMENDMENT TO CONSTITUTION: REPORT OF COMMISSION APPOINTED UNDER JOINT RESOLUTION APPROVED JANUARY 29, 1919 5 (1920) [hereinafter COMM. TO PREPARE & PRESENT AMENDMENTS TO THE CONSTITUTION] ("It has been generally held that in the absence of any constitutional provision to that effect, vacancies in the house of representatives may not be filled.").

[122] There is some limited evidence to suggest that special elections, as a practical matter, simply didn't happen at the state level at the frequency with which they were required to. *See, e.g.*, Brown v. Lamprey, 206 A.2d 493, 495 (N.H. 1965) (providing an example of when a special election should have taken place, but did not, due to political manipulation.).

Senators.[123] Several states—namely, Nebraska, Nevada, and Oregon—had amended their state constitutions to provide for the *de facto* direct election of senators.[124] Those states scheduled statewide advisory senate elections and required state legislatures to honor the results of the election.[125] In 1911, just two years after Nebraska provided for the direct election of senators, it became the first state in the modern era to provide for temporary same-party appointments as a means of filling state legislative vacancies.[126] In 1912, Vermont followed, but only for state senate vacancies[127]—the state constitution provided no authority for the legislature to fill state house vacancies.[128] Vermont's scheme was not one that required a same-party appointment; the governor was, and is, empowered to select any resident of the vacated district.[129]

Momentum in favor of legislative appointments began in earnest following the ratification of the Seventeenth Amendment in 1913. Shortly thereafter, in 1921, Arizona passed legislation requiring that county commissions fill legislative vacancies with same-party appointments.[130] (Arizona's system was short-lived; the legislature repealed it two years later after the governor complained that it was unconstitutional.[131]) Idaho joined the club in 1923, but it did so

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[123] U.S. CONST. amend. XVII.

[124] Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1354 (1996) [hereinafter Amar, *Indirect Effects of Direct Election*].

[125] *Id.*

[126] Act of Apr. 8, 1911, ch. 45, 1911 Neb. Sess. Laws 215–16. Nebraska's appointment procedure would only apply if the vacancy occurred during the legislative session, or between the legislative session and the next general election. If it occurred before the session, then the governor was required to call a special election. *Id.*

[127] Act of Oct. 30, 1912, ch. 15, § 1, 1912 Vt. Sess. Laws 17.

[128] COMM. TO PREPARE & PRESENT AMENDMENTS TO THE CONSTITUTION, *supra* note 121, at 2.

[129] VT. STAT. ANN. tit. 17, § 2623 (2020).

[130] Act of Feb. 26, 1921, ch. 36, § 1, 1921 Ariz. Sess. Laws 43.

[131] Act of Mar. 10, 1923, ch. 37, § 1, 1923 Ariz. Sess. Laws 118–21. Governor George W.P. Hunt argued that the statute was unconstitutional because the constitutional provision outlining the required qualifications of legislators referred to them having been "elected." George W.P. Hunt, Governor of Arizona,

rather clumsily. Rather than creating a clear process for filling legislative vacancies, the legislature repealed the statutory requirement of special elections[132] and fell back on the governor's constitutional power to fill vacancies in "any office[]" when the method was not provided for.[133]

Importantly, Arizona, Idaho, Nebraska, and Vermont all had constitutions that did not require legislative vacancies to be filled at special elections, making it substantially easier to alter the process.[134] Nevada became the first state to amend its constitution to this effect in 1924, adopting a plan almost identical to Arizona's, requiring county commissioners to fill vacancies with same-party appointments.[135] Vermont corrected its asymmetric treatment of

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Message to the Legislature (Jan. 8, 1923), *in* S. JOURNAL, 6th Leg., Gen. Sess. 9 (Ariz. 1923). In the brief, two-year period in which the statute came into effect, however, it had been successfully utilized twice. In 1922, State Representatives Dana T. Milner and Fred P. Perkins resigned. H. JOURNAL, 5th Leg., 1st Special Sess. 1 (Ariz. 1922). Accordingly, the Cochise County Board of Supervisors named Lyman H. Hays as Milner's replacement and the Coconino County Board named S.B. Gilliland as Perkins's. *Id.* at 2–3.

[132] Act of Jan. 24, 1923, ch. 2, 1923 Idaho Sess. Laws 4 ("That Section 462 of the Idaho Compiled Statutes, 1919, be and the same is hereby repealed."). Section 462 provided, "When a vacancy occurs in the office of a member of the legislature, and the body in which such vacancy exists is in session, or will convene prior to the next general election, the governor shall order a special election to fill such vacancy at the earliest practicable time, and 10 days' notice of such election shall be given." IDAHO CODE § 462 (1919).

[133] IDAHO CONST. art. VI, § 6 ("The governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for."); *see also* Letter from Charles C. Moore, Governor of Idaho, to the Senate of the State of Idaho (Feb. 19, 1925) ("I have the honor to advise that pursuant to the authority vested in me by Section 6, Article VI of the Constitution of the State of Idaho, I hereby nominate, and, subject to the consent of the Senate, appoint Mr. James C. Mills, Jr., of Garden Valley, Boise County, Idaho, a member of the House of Representatives of the State of Idaho for Boise County, for the term ending December 1, 1926."), *in* S. JOURNAL, 18th Leg., Gen. Sess. 283 (Idaho 1925).

[134] *See, e.g.*, ARIZ. CONST. of 1912, art. IV, pt. 2; IDAHO CONST. of 1889, art. III; NEB. CONST. of 1875, art. III; VT. CONST. ch. 2 (amended 1836).

[135] NEV. CONST. art. IV, § 12 ("In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint

legislative vacancies that year as well, following a 1919 state constitutional commission proposal to amend the constitution.[136] The proposal, ratified by the voters of Vermont in 1924, provided the legislature with "the power to regulate by law the mode of filling all vacancies in the House of Representatives which shall happen by death, resignation or otherwise."[137] In 1925, following the amendment, the legislature moved quickly and passed legislation allowing the governor to fill house vacancies through appointment.[138]

In 1925, West Virginia, which also lacked a constitutional special election requirement, amended its election code to allow legislative appointments.[139] But West Virginia's legislative appointment scheme only applied when the incumbent died in office—it preserved special elections to fill vacancies caused by everything else.[140] If a legislator died, then the county executive committee of the political party to which the decedent belonged would be required to hold a meeting to nominate a person to fill the vacancy. The governor would then formally appoint that person to fill the vacancy.[141] This created the first same-party appointment system through which the political party itself held power in filling a vacancy.

In 1930, a trio of states—Oregon, Utah, and Washington—each amended their constitutions to pave the path for legislative appointments. Washington's amendment directly put in place an appointment system, empowering county commissioners to fill vacancies.[142] Oregon and Utah's amendments took less direct paths,

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a person of the same political party as the party which elected the senator or assemblyman to fill such vacancy; *provided*, that this section shall apply only in cases where no general election takes place between the time of such death or resignation and the next succeeding session of the legislature.").

[136] COMM. TO PREPARE & PRESENT AMENDMENTS TO THE CONSTITUTION, *supra* note 121.

[137] VT. CONST. of 1924, ch. 2, § 13.

[138] Act of Jan. 28, 1925, ch. 8, § 1, 1925 Vt. Sess. Laws 10.

[139] Act of Apr. 24, 1925, ch. 56, 1925 W. Va. Acts 175–77.

[140] *Id.*

[141] *Id.* at 175–76.

[142] WASH. CONST. art. II, § 15 (amended 1930) ("Such vacancies as may occur in either house of the legislature shall be filled by appointment by the board

instead merely providing that vacancies "shall be filled as may be provided by law"[143] and "shall be filled in such manner as may be provided by law,"[144] respectively. All three amendments passed, and Utah and Oregon subsequently codified appointment procedures several years later. Utah's appointment scheme required the governor to appoint a replacement recommended by the previous legislator's political party,[145] while Oregon's granted county commissioners appointive power with no same-party requirement.[146] Montana followed in 1932, amending its constitution to allow county commissioners to fill vacancies, but, following West Virginia's lead, only when the vacancies occurred because the incumbent died.[147] And in 1936, Maryland amended its

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of county commissioners of the county in which the vacancy occurs: *Provided*, That in the case of a vacancy occurring in the office of a joint senator [a senator representing more than one county] the vacancy shall be filled by appointment by the joint action of the boards of county commissioners of the counties composing the joint senatorial district.").

[143] OR. CONST. art. IV, § 3. In Oregon, this amendment took place fifteen years after then-Governor Oswald West attempted to fill a state senate vacancy in violation of purportedly ambiguous state law by appointing his cousin, Kathryne Clarke, who would have been the first female state senator. Kimberly Jensen, *Revolutions in the Machinery: Oregon Women and Citizenship in Sesquicentennial Perspective*, 110 OR. HIST. Q. 336, 346–47 (2009). Following an outcry from state senate leaders, and an informal advisory opinion from the state attorney general, West withdrew the appointment and scheduled a special election, which Clarke ended up winning anyway. *See Woman Selected for Senate Seat*, MORNING OREGONIAN, Jan. 4, 1915, at 5; *see also* Jensen, *supra* (discussing Clarke's appointment).

[144] UTAH CONST. art. VI, § 13.

[145] Act of Mar. 9, 1933, ch. 18, 1933 Utah Laws 33.

[146] Act of Mar. 5, 1935, ch. 190, § 1, 1935 Or. Laws 281. During interim period, the state attorney general noted that the 1930 constitutional amendment did not actually strike from the constitution the requirement of holding special elections to fill legislative vacancies. *In Re* Method of Filling Vacancy in Office of State Senator, 15 Op. Att'y Gen. No. 63 (1930). Nonetheless, the attorney general issued an opinion declaring that the 1930 amendment abrogated the earlier constitutional provision. *Id.* But until the legislature used the power granted to it by the 1930 amendment, special elections were used. *Id.*

[147] MONT. CONST. of 1932, art. 5, § 45 ("When vacancies, caused by death, occur in either house of the Legislative Assembly, such vacancies shall be filled by appointment by the board of county commissioners of the county from which

constitution to require the governor to fill a legislative vacancy from among a list of nominees generated by the state party with which the legislator had been "affiliated."[148] In short, in the roughly twenty-five-year period that succeeded the ratification of the Seventeenth Amendment, eleven states provided for some form of legislative appointments.[149]

B. The Mid-Twentieth Century Adoption of Legislative Appointments

As the 1930s came to a close, the momentum in favor of legislative appointment schemes slowed until the mid-1940s, which saw another burst of activity that lasted until the mid-1960s. The states that adopted appointment methods during this period primarily did so by amending their constitutions. But, for the most part, they didn't do so by prescribing any specific method—instead, they merely delegated power to the legislature to arrive at a method. Kansas delegated that power to its legislature in a 1946 constitutional amendment,[150] and at the 1947 session, the legislature considered same-party appointment schemes in which the governor or county party executive committees would fill vacancies, ultimately opting for the latter.[151] In 1948, Wyoming and South

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such vacancy occurs. All vacancies occurring from any other cause shall be filled by election upon proclamation of the Governor."). In 1966, as part of a comprehensive constitutional amendment, this provision was repealed. Act of Mar. 9, 1965, ch. 273, § 3, 1965 Mont. Laws 856, 857. The repeal may have been accidental, however, because the following year, the legislature re-enacted it statutorily and expanded it to cover all vacancies. Act of Feb. 28, 1967, ch. 179, § 1, 1967 Mont. Laws 317, 318.

[148] MD. CONST. art. III, § 13.

[149] In order, Nebraska (1911), Vermont (1912 for senate; 1925 for house), Arizona (only from 1921 to 1923), Idaho (1923), Nevada (1924), West Virginia (1925), Oregon (1930), Utah (1930), Washington (1930), Montana (1932), and Maryland (1936). *See infra* Part II.

[150] *See* KAN. CONST. art. II, § 9 (amended 1945) ("All vacancies occurring in either house shall be filled in such manner as the legislature shall provide.").

[151] Act of Feb. 27, 1947, ch. 246, § 1, 1947 Kan. Sess. Laws 377. *Compare* H. JOURNAL, H. 35, Gen. Sess., at 83, 93 (Kan. 1947) (the Kansas House amending the bill to provide for gubernatorial appointments), *with* S. JOURNAL,

Dakota—which had previously seen their voters reject similar amendments in 1940[152] and 1946,[153] respectively—amended their constitutions as well. South Dakota followed Vermont's lead and granted its governor the power to fill vacancies with no same-party

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S. 35, Gen. Sess., at 85 (Kan. 1947) (the state's senate rejecting the house amendment).

[152] ALAN L. CLEM, SOUTH DAKOTA POLITICAL ALMANAC 39 (2d ed. 1969). The best available source suggests that South Dakota's 1940 amendment failed because of a sense that county commissioners, rather than the governor, should fill legislative vacancies. Harold S. Milner, *School Fund Is Most Discussed of Three Special Issues*, EVENING HURONITE, Oct. 31, 1940, at 3 ("Opponents argue that legislation which would permit counties concerned to make the selections would be more advisable."). However, the successful 1948 amendment contained virtually identical language. *Compare* H.R.J. Res. 5, 26th Leg., Reg. Sess. (S.D. 1939) ("Whenever any duly elected Senator or Representative shall die, resign, or fail to qualify for any other reason, the Governor shall appoint a qualified person from such legislative district to fill such vacancy."), *with* S.D. CONST. art. III, § 10 ("The Governor shall make appointments to fill such vacancies as may occur in either house of the Legislature.").

[153] A. G. CRANE, 1947 WYOMING OFFICIAL DIRECTORY AND 1946 ELECTION RETURNS 80–81 (1947). The 1946 amendment likely failed because of voter confusion. The legislatively referred proposal would have repealed the provision of the constitution providing for special elections—but left nothing in its place. H.R.J. Res. 2, 28th Leg., Gen. Sess. (Wyo. 1945). At the 1946 election, though the proposal won a majority of the votes cast on the question, it ultimately failed due to excessive abstentions. State *ex rel.* Blair v. Brooks, 17 Wyo. 344, 353 (1909) (holding that the Wyoming Constitution requires proposed amendments be ratified by "a majority of the electors, that is, electors of the state, and not a majority of those actually voting upon the question"); *see* CRANE, *supra* at 77, 81 (showing that, though Amendment 1 received 67% of the votes cast on it, it only received 40% of the total votes cast). During the 1947 legislative session, Governor Lester Hunt speculated that voter ignorance was the culprit—he argued that the previous year's "amendments failed of adoption solely because the people were uninformed and, from the amendments as they were placed on the ballot, had no way of knowing what they were supposed to accomplish," and that the legislature should try again, and "fully inform[]" the people by using more exact and precise language. Lester C. Hunt, Governor of Wyoming, Governor's Message to the Twenty-Ninth State Legislature (Jan. 15, 1947), *in* H.R. Res. 30, 29th Leg., Gen. Sess. 30 (Wyo. 1947). The legislature did so, and the 1948 election added another provision to the constitution specifically delegating to the legislature the power to determine how vacancies were filled. H.R.J. Res. 5, 29th Leg., Gen. Sess. (Wyo. 1947).

requirement.[154] Wyoming, meanwhile, delegated the responsibility for developing a specific system to its legislature.[155]

In 1949, the Colorado legislature moved to pass an amendment to the constitution allowing county commissioners to fill legislative vacancies through same-party appointments.[156] However, that idea was scrapped, and the proposal was amended to simply grant the legislature the ability to statutorily establish a method,[157] which ultimately became crystallized in the constitution.[158] At the 1951 session, the legislature backed a plan similar to Kansas's, in which the county party was responsible for filling any legislative vacancy.[159] North Carolina became one of the few southern states to abandon special elections in favor of legislative appointments, following the passage of a constitutional amendment requiring the governor to fill vacancies by appointing a replacement selected by the previous legislator's political party.[160] In 1953, New Mexico became the eleventh state in the West to adopt a legislative appointment scheme. New Mexico's system directly placed the appointment power in a county commission if the vacated district was located only within one county, and with the governor if it spanned two or more counties—but the county commissions still held important power even in that event, because the governor was required to pick an appointee from a list of nominees generated by the county commissions.[161]

Hawai'i and Alaska became the first two states to be admitted to the Union with constitutions that explicitly provided for legislative

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[154] S.D. CONST. art. III, § 10.

[155] WYO. CONST. art. III, § 51.

[156] *See* H. JOURNAL, 37th Leg., Gen. Sess. 755 (Colo. 1949).

[157] *Id.* at 1395. I make a personal note here that my great-granduncle, Samuel Tesitore Taylor, was in his fourth term as a state senator during the 1949 session and was the original author of the language that was eventually adopted by the legislature and incorporated into the state constitution. *See* H.R. Res. 40, 37th Leg., Gen. Sess. 40–41 (Colo. 1949) ("All vacancies occurring in either house shall be filled in the manner prescribed by law.").

[158] COLO. CONST. art. II, § 5.

[159] Act of Jan. 24, 1951, ch. 160, 1951 Colo. Sess. Laws 364.

[160] N.C. CONST. art. II, § 13.

[161] N.M. CONST. art. IV, § 4.

appointments. At the 1950 Hawai'i Constitutional Convention, the delegates approved language providing that legislative vacancies were to be filled "in such manner as may be prescribed by law," but if no provision was made, the governor made an appointment.[162] Alaska did the exact same, with almost verbatim language.[163] Upon statehood, Alaska immediately adopted a comprehensive election code that included an intricate system of legislative appointment by which the governor nominates a replacement from the former legislator's political party, which would then be approved by legislators of that party.[164] Hawai'i, however, briefly required special elections to fill vacancies, but replaced that requirement with same-party appointment by 1963.[165]

Two current states—Ohio and Tennessee—also amended their constitutions in the 1960s, but rather haphazardly. In 1961, Ohio amended its constitution to end special elections for state senate vacancies, creating a system through which appointments were made "by the members of the Senate who are affiliated with the same political party as the person last elected by the electors to the seat which has become vacant."[166] This system, unique in the country, perhaps drew on the method by which state legislative vacancies were filled by legislatures in the nineteenth century.[167] But the effort didn't include state house vacancies,[168] and the

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[162] HAW. CONST. art. III, § 5; ANNE FEDER LEE, THE HAWAII STATE CONSTITUTION: A REFERENCE GUIDE 82–83 (1993).

[163] ALASKA CONST. art. II, § 4 ("A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment."). A handwritten note on the 1955–56 Constitutional Convention's preliminary draft for the Section explicitly said, "use Hawaii[a]n terminology for this Section." ALASKA STATE LEGISLATURE, ALASKA CONSTITUTIONAL CONVENTION 1955–1956 9, http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20207.pdf (last visited Mar. 22, 2020).

[164] Alaska Election Code, ch. 83, §§ 8.51–8.66, 1960 Alaska Sess. Laws 107–09.

[165] LEE, *supra* note 162, at 83.

[166] OHIO CONST. art. II, § 11.

[167] *Supra* Section II.B.

[168] This appears, for reasons that are not entirely clear, to have been a deliberate move. In his 1961 State of the State address, Governor Michael V. DiSalle specifically called on the legislature to amend the constitution "with

constitution was amended to provide a parallel method to fill state house vacancies in 1968.[169] Tennessee, meanwhile, convened a constitutional convention in 1965 that considered a slew of constitutional changes, including altering the method by which legislative vacancies were filled. Ultimately, the delegates backed an amendment that granted the appointment power to county commissions, though they repeatedly rejected efforts to require same-party appointments.[170]

After this, the pace considerably slowed at the state level. Only four more states adopted appointment schemes. The first of these was Illinois, in 1970, following a constitutional convention that took place over the previous two years. The Illinois Constitutional Study Commission provided the convention with a history of the state's special election requirement and conducted a brief survey of how states elsewhere in the country filled vacancies.[171] Ultimately, the Commission adopted a same-party appointment system, but also

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reference to the filling of vacancies in the state senate of Ohio." H. JOURNAL, 104th Leg., Gen. Sess. 1968 (Ohio 1961).

[169] Amended Substitute H. Joint Res. 3, 107th Leg., Reg. Sess. (Ohio 1968). This move only came after unsuccessful proposals in 1963, 1964, 1965, and the urging of James Rhodes in 1964. H. JOURNAL, 105th Leg., Gen. Sess. 136 (Ohio 1963); H. JOURNAL, 105th Leg., Spec. Sess. 98–99 (Ohio 1964); S. JOURNAL, 105th Leg., Spec. Sess. 65–66 (Ohio 1964) (message of Governor James Rhodes) (urging the state legislature to "propose an amendment or amendments to Article II, Sections 2, 8 and 11 of the Constitution of Ohio to change the time of election and the term of office of Representatives, and to provide for the filling of vacancies in the House of Representatives, and to provide for the holding of annual sessions of the General Assembly"); H. JOURNAL, 106th Leg., Gen. Sess. 242, 396 (Ohio 1965); S. JOURNAL, 106th Leg., Gen. Sess. 105 (Ohio 1965).

[170] TENN. CONST. CONVENTION, JOURNAL AND PROCEEDINGS OF THE LIMITED CONSTITUTIONAL CONVENTION ix, 182, 183 (1965) [hereinafter 1965 TENNESSEE CONSTITUTIONAL CONVENTION JOURNAL]. A subsequent constitutional convention, held in 1977, substantially pulled back the appointment scheme adopted in 1965. Under the 1977 amendment, county commissions could only make appointments if less than a year remained in the legislator's term; otherwise, they would be replaced at a special election. Lewis Laska, *The 1977 Limited Constitutional Convention*, 61 TENN. L. REV. 485, 524 (1994).

[171] GEORGE D. BRADEN & RUBIN G. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 118–20 (1969).

gave the legislature the ability to further iron out the details.[172] Arizona re-adopted a legislative reappointment scheme in 1987,[173] virtually identical to what it repealed sixty-four years earlier.[174] New Jersey adopted a constitutional amendment in 1988 empowering the political party of the predecessor to fill her vacancy.[175] Finally, in 2000, North Dakota voters approved an amendment allowing the legislature to determine how vacancies are filled,[176] which it did the next year, allowing political parties to directly fill vacancies.[177]

C. Territories, Commonwealths, the District of Columbia, and Legislative Appointments

Independently of the states, the territories of the United States also adopted legislative appointment schemes, but in quite different ways. Given that the territories are organized under the auspice of the federal government, the structure of their governments is

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[172] ILL. CONST. art. IV, § 2(d) ("Within thirty days after a vacancy occurs, it shall be filled by appointment as provided by law. If the vacancy is in a Senatorial office with more than twenty-eight months remaining in the term, the appointed Senator shall serve until the next general election, at which time a Senator shall be elected to serve for the remainder of the term. If the vacancy is in a Representative office or in any other Senatorial office, the appointment shall be for the remainder of the term. An appointee to fill a vacancy shall be a member of the same political party as the person he succeeds.").

[173] Act of Apr. 29, 1987, ch. 186, 1987 Ariz. Sess. Laws 524.

[174] *Compare id.* ("If a vacancy occurs in the legislature, the board of supervisors of the county in which the affected legislative district is located shall appoint . . . a qualified elector to fill the vacancy who . . . belongs to the same political party . . . as the person elected to or appointed to the office immediately before the vacancy."), *with* Act of Feb. 26, 1921, ch. 36, 1987 Ariz. Sess. Laws 43 ("Whenever a vacancy occurs in either House of the Legislature . . . the Board of Supervisors of the county where such vacancy occurs are . . . directed to forthwith appoint some qualified elector, who shall be of the same political faith and belong to the same political party, . . . as his immediate predecessor to such office, to fill such vacancy.").

[175] N.J. CONST. art. IV, § 4, para. 1.

[176] *Id.* § 11.

[177] N.D. CENT. CODE § 16.1-13-10 (2020).

determined by Congress and the Secretary of the Interior.[178] In 1938, Puerto Rico became the first American territory to use legislative appointments when Congress amended the Jones–Shafroth Act, which organized the territorial government. Congress's 1938 amendment provided for same-party appointments to be made by the governor in consultation with the political party of the former legislator.[179] The Puerto Rican legislature had requested the change in 1930 because the Jones–Shafroth Act made no provision for filling vacancies of senators elected at-large and due to the prohibitive costs of holding special elections.[180] However, the Hoover administration had objected to the legislation when it was previously considered, on the grounds that it "would tend to inject the governor to an undesirable degree into the internal affairs of the political parties of Porto Rico."[181] The election of Franklin Roosevelt ultimately paved the way for the change, and during the second Roosevelt administration, the Department of the Interior had no objection to nearly identical legislation,[182] which ultimately passed.

When Puerto Rico drafted its constitution in 1952, it largely kept the provisions in Congress's 1938 amendment, but crafted a substantially more complicated system that created alternative paths for filling vacancies depending on when they occurred and the party

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[178] Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 HAWAII L. REV. 445, 449–59 (1992) (explaining the status of American territories under the U.S. Constitution); Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1254–63 (2019) (explaining the legal status of American territories, including that Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands exist under the supervision of the Department of the Interior); Ediberto Roman, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 586–87 (2006) (describing the Office of Insular Affairs' role in "administering the United States' territories").

[179] Act of June 1, 1938, Pub. L. No. 75-570, 52 Stat. 595.

[180] *Filling of Certain Vacancies in the Senate and House of Representatives of Porto Rico: Hearing on S. 4502 Before the S. Comm. on Territories and Insular Affairs*, 71st Cong. 1–3 (1930) (resolution passed by the Puerto Rican Legislature and statement of Santiago Iglesias, Puerto Rican Senator).

[181] *Id.* at 7 (letter of Patrick J. Hurley, United States Secretary of War).

[182] H.R. REP. No. 75-1262, at 2 (1937) (letter of Harold L. Ickes, United States Secretary of the Interior).

of the legislator.[183] An amendment in 1964 provided for a more simplified system—the legislature is vested with the power to determine how district vacancies are filled, and at-large vacancies are filled by the presiding officer of each chamber based on a recommendation from the predecessor's party.[184]

In 1954, Congress revised the Organic Act of the Virgin Islands, which effectively overrode the territorial legislature's requirement that legislative vacancies be filled by special elections.[185] Instead, Congress granted the governor the power to fill vacancies with no same-party requirement.[186] In 1973, Congress modified this provision by instead granting the legislature the ability to determine the procedure for filling vacancies.[187] The legislature slightly changed the method—it required a special election if the vacancy occurred more than a year before the next general election and otherwise required a same-party gubernatorial appointment.[188]

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[183] PUERTO RICO CONST. art. III, § 8 (1952).

[184] PUERTO RICO CONST. art. III, § 8 (amended 1964).

[185] *Compare* Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, § 5(h), 68 Stat. 497, 500 (1954), *with* Act of Apr. 1, 1941, 1941 V.I. Terr. Laws 26 ("[U]ntil otherwise provided by Act of the Legislative Assembly of the Virgin Islands, special elections to fill vacancies occurring by reason of death, resignation, or otherwise in the membership of the Municipal Council of St. Croix shall be held upon call of the Governor of the Virgin Islands who shall fix the dates for such special elections.").

[186] Revised Organic Act of the Virgin Islands, § 5(h).

[187] Act of Oct. 19, 1973, Pub. L. No. 83-517, 68 Stat. 500 (1973).

[188] Act of Jan. 11, 1974, No. 3517, 1974 V.I. Sess. Laws 310, 310–11. In 2009, the U.S. Virgin Islands held its Fifth Constitutional Convention, which proposed a method for filling vacancies that roughly mirrored the Northern Mariana Islands' provision. V.I. CONST. art. V, § 5 ("If a vacancy occurs in the Senate, the President of the Senate shall, within thirty days, appoint the next available person from among those candidates considered in the order of the highest number of votes received for that seat in the last election. If there is no available candidate, the vacancy shall be filled as provided by law.") (proposed 2009). However, the constitution was not accepted by Congress, likely due to concerns raised by the U.S. Department of Justice regarding "the failure to expressly mention United States sovereignty and the recognition of special privileges to certain residents, which may violate the Equal Protection Clause of the United States Constitution." Katy Womble & Courtney Cox Hatcher, *Trouble in Paradise? Examining the Jurisdictional and Precedential Relationships*

American Samoa adopted a system in its 1966 constitution that generally provided for special elections, but if a vacancy occurred within three months of the next election, the governor filled it "by appointment of the person recommended by the County Chiefs of the county from which the vacancy arose."[189] A minor change in the decades that followed instead merely required the governor to consult with the district governor and county chiefs rather than accept the chiefs' recommendation outright.[190]

In 1973, Congress passed legislation creating home rule for the District of Columbia. The Act generally provided for special elections, but for vacancies among at-large city councilmembers, their political parties were empowered to fill their vacancies.[191]

Finally, when the Northern Mariana Islands formally affiliated themselves with the United States in 1977, their new constitution also generally provided for special elections, but if less than half of the term remained, the governor was required to appoint the runner-up from the previous election.[192]

III. HOW LEGISLATIVE VACANCIES ARE FILLED

The processes by which states fill legislative vacancies largely fall into two separate categories: special elections and legislative appointments. But viewing these as mutually exclusive processes is misleading. The vast majority of states filling vacancies through some method of appointment also use some form of special election at least some of the time. For example, in several states and territories, the default presumption is to hold a special election—unless the vacancy occurs a set amount of time before the next regularly scheduled election or a set amount of time into the incumbent's term of office. Virtually all of the others merely view appointments as a temporary process, meant to preserve the pre-

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Affecting the Virgin Islands Judiciary, 46 STETSON L. REV. 441, 451 n.74 (2017) (citation omitted).

[189] AM. SAMOA CONST. art. II, § 3.

[190] *Id.* § 13.

[191] District of Columbia Home Rule Act, Pub. L. 93-198, § 753, 87 Stat. 774, 835 (1973).

[192] N. MAR. I. CONST. art. II, § 9.

vacancy status quo, and actually schedule special elections on the same day as—and conducted on the same ballot as—the next general election.[193] Accordingly, special elections and appointments are not separate circles as much as they are a Venn diagram with significant overlap.

The purpose of this Part is to categorize the system of legislative appointments as used in twenty-five states, four territories, and the District of Columbia. Unfortunately, these systems don't fit neatly into separate, discrete categories and are better understood as mixing and matching each other in different ways. This Part leans into that conceptual amorphousness and focuses on the answers to two categorizing questions. First, which political actors—state or private—are responsible for filling legislative vacancies? Second, what requirements do those actors operate under when filling vacancies? Each of these questions is addressed in a separate section.

A. The Responsible Actors

In thinking about filling legislative vacancies with some kind of temporary appointment rather than a special election, the most obvious question asks which actors are responsible for making the appointments. A survey of the thirty jurisdictions employing legislative appointments reveals both common threads and a richness of diversity. Depending on the jurisdiction in question, the responsible actor may be the governor, *district* governor, legislature, state house speaker, state senate president, county commission, state party, village chiefs, or head of legislative management—or some combination thereof.[194] Of these, four categories of actors are the likeliest to be vested with appointment power: the governor, the

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[193] "Every election called to fill a vacancy is a special election, and the fact that it is held on the same day as the general election does not change its character." People *ex rel*. Anderson v. Czarnecki, 312 Ill. 271, 274 (1924).

[194] *E.g.*, MD. CONST. art. III, § 13 (governor); NEV. CONST. art. IV, § 12 (county commission); OHIO CONST. art. II, § 11 (legislature); COLO. REV. STAT. § 1-12-203 (2019) (political party); N.D. CENT. CODE § 16.1-13-10 (2020) (head of legislative management); P.R. LAWS ANN. tit. 16, § 4146 (2019) (state house speaker and state senate president); AM. SAMOA CODE ANN. §§ 2.0204 (district governor), 6.0108 (village chiefs) (West 2019).

county commission where the district is located, the legislature, or the party representing the previous incumbent. Each is addressed in turn.

Empowering the governor of a state (or territory) to fill a legislative vacancy is a relatively logical, popular choice, which is used by twelve states—Alaska, Hawai'i, Idaho, Kansas, Maryland, Nebraska, New Mexico, North Carolina, South Dakota, Utah, Vermont, and West Virginia—and three territories—the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands—at least *some* of the time.[195] But this power is more limited than it seems. In Kansas, Maryland, North Carolina, Utah, and the Virgin Islands, the governor makes only a nominal, *de jure* appointment after a state party sends her the person to be appointed.[196] In essence, these states provide for gubernatorial "appointments" that are more practically just rubber stamps. In Kansas and North Carolina, the law makes that reality abundantly clear—if the governor does not make the appointment after the state party submits its designee, the designee is automatically appointed.[197] The Northern Mariana Islands also deprive the governor of a practical choice, but in quite a different way. There, the governor is required to appoint the first

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[195] MD. CONST. art. III, § 13; S.D. CONST. art. III, § 10; N. MAR. I. CONST. art. II, § 9; ALASKA STAT. §§ 15.40.320–.380 (2019); HAW. REV. STAT. ANN. §§ 17-3, 17-4 (West 2019); IDAHO CODE § 59-904A (2020); KAN. STAT. ANN. § 25-3902 (2019); NEB. REV. STAT. § 32-566 (2020); N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020); N.C. GEN. STAT. § 163-11 (2019); UTAH CODE ANN. § 20A-1-503 (West 2019); VT. STAT. ANN. tit. 17, § 2623 (2020); W. VA. CODE § 3-10-5 (2020); §§ 2.0204, 6.0108. Illinois could nominally be included on this list; the governor has the ability to fill a vacancy by appointment, but only if the legislator was "elected other than as a candidate of a political party," *i.e.*, as an independent, and was not affiliated with a party when serving in the legislature. 10 ILL. COMP. STAT. ANN. 5/25-6(b) (West 2019).

[196] MD. CONST. art. III, § 13; § 25-3902; § 163-11; § 20A-1-503.

[197] § 25-3902(g) ("In the event the governor or lieutenant governor fails to appoint any person as required by this subsection after receiving a lawfully executed certificate hereunder, such person shall be deemed to have been so appointed notwithstanding such failure."); § 163-11(a) ("If the Governor fails to make the appointment within the required period, he shall be presumed to have made the appointment and the legislative body to which the appointee was recommended is directed to seat the appointee as a member in good standing for the duration of the unexpired term.").

runner-up from the last election—if no such person exists or accepts the appointment, the governor can appoint any qualified voter.[198]

Other states, like Hawai'i, Idaho, and West Virginia, grant the governor slightly more power, allowing her to pick an appointee from a list of three names submitted to her by the state party.[199] In New Mexico, if the vacated legislative district includes more than one county, the governor makes an appointment from a list of nominees submitted to her by the county commissions, each of which submits one name.[200] In Alaska, the dynamic is roughly reversed, wherein the governor makes a nomination to the legislature, which then confirms or rejects it.[201] However, the confirmation power isn't vested in the entire legislature—just in legislators who are members of the previous incumbent's party and who serve in the same chamber.[202]

Governors have considerably more power in American Samoa, Nebraska, South Dakota, and Vermont. In Nebraska and South Dakota, the governor faces virtually no restrictions in whom she may appoint,[203] other than that, presumably, the appointee must be

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[198] N. MAR. I. CONST. art. II, § 9 ("[T]he governor shall fill the vacancy by appointing the unsuccessful candidate for the office in the last election who received the largest number of votes and is willing to serve or, if no candidate is available, a person qualified for the office from the district represented."). Lest the phrase "last election" be unclear when discussing a bicameral legislature in which members of the upper chamber are elected in staggered terms, the commonwealth supreme court helpfully clarified that it refers to "the most recent chronological election," not "the last election for that particular Senate seat." Maratita v. Cruz, 2013 MP 15, 17, 28–29 (N. Mar. I. 2013).

[199] §§ 17-3, 17-4; § 59-904A; W. VA. CODE § 3-10-5 (2020).

[200] N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020).

[201] ALASKA STAT. §§ 15.40.320–.330 (2019).

[202] *Id.* § 15.40.330.

[203] S.D. CONST. art. III, § 10; NEB. REV. STAT. § 32-566 (2020). In the context of Nebraska, given that its legislature is nonpartisan, this makes sense. In recent decades, legislators in South Dakota have attempted to require same-party appointments to no avail. *E.g.*, Tim Anderson, *Midwest's States Take Different Approaches to Filling Legislative Vacancies*, COUNCIL ST. GOV'TS (Sept. 18, 2018, 12:16 PM), https://knowledgecenter.csg.org/kc/content/midwests-states-take-different-approaches-filling-legislative-vacancies; Bob Mercer, *Nelson Resignation Gives Governor a Sixth Vacancy in Legislature to Fill This Year*, KELO (Nov. 21, 2019), https://www.keloland.com/news/capitol-news

eligible to hold public office. In American Samoa, the governor is required to consult with the county chiefs in the district before making an appointment to fill a legislative vacancy,[204] and also with the district governor when filling a senate vacancy.[205] Similarly, in Vermont, the governor may "request the political party or parties of the person whose death or resignation created the vacancy to submit one or more recommendations as to a successor," but she is not required to accept the party's recommendation and can appoint whomever she likes.[206]

Some states have provisions allowing the governor to make an appointment to the state legislature in case of a tie.[207] These provisions are similar to the mechanism used in Maine,

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-bureau/nelson-resignation-gives-governor-a-sixth-vacancy-in-legislature-to-fill-this-year/. Republican State Representative Tom Pischke, who has sponsored the recent efforts to require same-party appointments in South Dakota, put rather bluntly what the absence of a same-party requirement means. He noted that "when his Democratic colleagues leave Pierre for the weekend during session, they sometimes joke amongst themselves 'to drive safely, because remember, the governor has the power to appoint.'" Anderson, *supra*.

[204] AM. SAM. CONST. art. II, § 13; AM. SAM. CODE ANN. §§ 2.0204 (relating to senate vacancies), 6.0108 (relating to house vacancies) (2011).

[205] § 2.0204. To avoid any ambiguity here, "district governor" doesn't refer to the governor of the *legislative* district. American Samoa is broken up into three administrative districts—the Eastern District, the Western District, and the District of Manu'a—and each is governed by a district governor. *Id.* §§ 5.0102–.0103. The district governors have powers that roughly resemble those of a mayor or county executive. *See id.* § 5.0104 ("The District Governor shall be responsible for the welfare and good order of the people in his district, shall preside at the meetings of the district council, and shall communicate with the Governor and the Secretary of Samoan Affairs upon matters pertaining to his duties."); PETER T. COLEMAN, 1957 ANNUAL REPORT: THE GOVERNOR OF AMERICAN SAMOA TO THE SECRETARY OF THE INTERIOR 16 (1957) ("A Samoan District Governor serves as the administrative head of each of the three political districts within the Territory."); *see also* U.S. CENSUS BUREAU, GEOGRAPHIC AREA REFERENCE MANUAL 4-2 (2018) (categorizing the American Samoan districts as county-equivalents).

[206] *See* VT. STAT. ANN. tit. 17, § 2623 (2019).

[207] *See, e.g.*, MONT. CODE ANN. § 13-16-503 (2019) ("If there is a tie vote for justice of the supreme court, judge of a district court, or member of the legislature, the secretary of state shall send a certified statement to the governor showing the votes cast for each individual and the governor shall appoint one of those candidates to the office.").

Massachusetts, and New Hampshire to fill legislative vacancies caused by failure to elect but, because of the rarity of tied elections, are hardly ever used. One of these provisions was notably triggered in a 2004 Montana State House election. Following an ostensible tie between Democratic nominee Jeanne Windham and Constitution Party nominee Rick Jore, outgoing Republican Governor Judy Martz broke the tie by appointing Jore to the legislature, which would've enabled Republicans to narrowly control the chamber.[208] The closeness of the race triggered an election contest, which was eventually resolved when the Montana Supreme Court invalidated five votes counted for Jore as overvotes, making Windham the winner.[209]

County commissions are also common actors with appointment power, especially in western states like Arizona, Montana, Nevada, New Mexico, Oregon, Tennessee, Washington, and Wyoming.[210] States that empower county commissions to fill legislative vacancies usually do so by either requiring the state (or county) party to nominate a slate of candidates to the county commission, which picks one, or by allowing the commission to pick on its own.[211]

In Arizona, Montana, Oregon, Washington, and Wyoming, the political party of the previous incumbent nominates a set of candidates—usually three, except in Oregon, where the party nominates between three and five candidates[212]—one of whom is picked by the county commission.[213] Meanwhile, in Nevada, New Mexico, and Tennessee, the county commission picks the

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[208] Jim Robbins, *Ruling Puts Democrats in Control in Montana*, N.Y. TIMES (Dec. 29, 2004), https://www.nytimes.com/2004/12/29/politics/ruling-puts-democrats-in-control-in-montana.html.

[209] Big Spring v. Jore, 109 P.3d 219, 227 (Mont. 2005).

[210] *See* NEV. CONST. art. IV, § 12; WASH. CONST. art. II, § 15; ARIZ. REV. STAT. ANN. § 41-1202 (2020); MONT. CODE ANN. § 5-2-402 (2019); N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020); OR. REV. STAT. §§ 171.060, 171.062 (2020); TENN. CODE § 2-14-202 (2020); WYO. STAT. § 22-18-111(a)(iii) (2020).

[211] *Compare* WASH. CONST. art. II, § 15; § 41-1202; § 5-2-402; § 171.060; § 22-18-111(a)(iii), *with* NEV. CONST. art. IV, § 12; §§ 2-7C-5, 2-8D-4; § 2-14-202.

[212] § 171.060 ("The party shall pursuant to party rule nominate not fewer than three nor more than five qualified persons to fill the vacancy.").

[213] WASH. CONST. art. II, § 15; § 41-1202; § 5-2-402; § 171.060; § 22-18-111(a)(iii).

replacement itself. Nevada requires its county commission to pick a member of the same party as the previous incumbent, but the other two states impose no such requirement.[214]

In both systems, if the legislative district includes more than one county, most states allow the county commissions of *all* represented counties to make the appointment, usually with their votes weighted based on population or share of the district.[215] But one state in each system—Arizona and Tennessee—only allows the county in which the previous incumbent resided to make the appointment. In Arizona, where the population and legislative districts are disproportionately located in just one county, this may make

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[214] NEV. CONST. art. IV, § 12; §§ 2-7C-5, 2-8D-4; § 2-14-202.

[215] WASH. CONST. art. II, § 15 ("That in case of a vacancy occurring in the office of joint senator, or joint representative, the vacancy shall be filled from a list of three nominees selected by the state central committee, by appointment by the joint action of the boards of county legislative authorities of the counties composing the joint senatorial or joint representative district," with the governor making the appointment if the commissions are unable to do so.); § 5-2-402(2)(b) ("Whenever a vacancy is within a multicounty district, the boards of county commissioners shall sit as one appointing board," with proportional votes based on the votes cast in each county for the previous incumbent, the total votes cast for that legislator in the entire district, and the number of county commissioners in each county.); NEV. REV. STAT. ANN. § 218A.260(3) (2019) ("Each board of county commissioners shall first meet separately and determine the single candidate it will nominate to fill the vacancy . . . . The boards shall then meet jointly . . . . At the joint meeting: The chair of each board, on behalf of that board, shall cast a proportionate number of votes according to the percent, rounded to the nearest whole percent, which the population of that board's county is of the population of the entire district," and "[t]he person who receives a plurality of these votes is appointed to fill the vacancy."); § 171.062 ("When a legislative district in which a vacancy occurs encompasses two or more counties, each county shall be entitled to one vote for each 1,000 of its electors or major fraction thereof residing within the legislative district at the time when . . . the office becomes vacant. However, any county having electors in the district shall be entitled to at least one vote."); § 22-18-111(a)(iii)(D) ("If the legislative district is in more than one (1) county, the vacancy shall be filled by the combined vote of the boards of county commissioners for those counties. The vote of each county commissioner in attendance shall be weighted so that the total vote of the commissioners from each county shall be in proportion to the population of the legislative district within that county.").

sense.[216] In Tennessee, which has ninety-five counties—the tenth most of any state—this is perhaps a more controversial choice.[217]

The last state actor vested with appointment power is a state's legislature, or its legislative officers, though this is much less common than the other methods. Only the Ohio legislature directly fills vacancies, at least, in most instances, with a unique system sharing some commonalities with Alaska, in which the members of the previous incumbent's political party and chamber vote for her replacement.[218] (And, of course, the Alaskan legislature has a reactive role in the appointment process, in that it confirms the governor's appointments rather than making any of its own.[219]) In Puerto Rico, the presiding officer of each legislative chamber has appointment powers that mirror those of some governors—in some instances, they are the actors responsible for appointing replacements nominated by the state party.[220]

Legislatures in the District of Columbia, North Dakota, and the Virgin Islands have some appointment power, but only if the previous incumbent is unaffiliated with a political party.[221] In D.C., the City Council—which, given D.C.'s legal status, is a *de facto* legislature—has the power to fill vacancies, but only if the previous incumbent was elected at-large, as an independent, and not as the

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[216] § 41-1202(A)(4) ("The state party chairman of the appropriate political party shall immediately forward the names of the three [nominees] . . . to the board of supervisors *of the county of residence of the person elected or appointed to the office* immediately before the vacancy occurred. The board of supervisors shall appoint a person from the three nominees submitted." (emphasis added)).

[217] *See, e.g.*, 1 TENN. LIMITED CONST. CONVENTION OF 1977, JOURNAL OF THE DEBATES OF THE CONSTITUTIONAL CONVENTION 365–66 (1977).

[218] OHIO CONST. art. II, § 11. It's unclear how independent legislators—or third-party legislators who have no surviving colleagues—would have their vacancies filled in Ohio.

[219] *See supra* notes 163–164 and accompanying text.

[220] P.R. LAWS ANN. tit. 16, § 4146 (2019). This power is only exercised if the previous incumbent was affiliated with a political party *and* if they were elected at-large *or* if they were elected in a district and fifteen months or fewer remain until the next general election. *Id.* Otherwise, a special election is held. *Id.*

[221] D.C. CODE § 1-204.01(d)(2) (2020); N.D. CENT. CODE § 16.1-13-10 (2020); V.I. CODE ANN. tit. 2, § 111 (2020).

chairman of the council.[222] Similarly, in the Virgin Islands, the legislature can fill a legislative vacancy by a two-thirds vote, but only if the previous incumbent was elected as an independent.[223] Meanwhile, in North Dakota, if the previous incumbent was an independent, the director of legislative management—effectively, the committee chair of an intra-legislative administrative committee[224]—fills the vacancy.[225]

Finally, non-state actors, in the form of political parties,[226] are also common recipients of appointment power. As mentioned previously, many states allow political parties to nominate replacement candidates to a state actor, like a governor or county commission. However, some states skip that process altogether and instead allow the party to directly make the nomination with no intervening action from a state actor. Colorado, the District of Columbia, Illinois, Indiana, New Jersey, North Dakota, and Puerto Rico utilize this kind of method for filling at least some vacancies.[227] However, this method is obviously inapplicable when someone is elected as an independent *or* as a member of a third party that is either defunct or lacking institutional organization. In those cases, the states that allow direct party appointment are inconsistent in how vacancies are filled—some states explicitly require special

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[222] § 1-204.01(d)(2).

[223] tit. 2, § 111.

[224] *See* § 54-35-02 (laying out the powers and duties of the legislative management).

[225] *Id.* § 16.1-13-10.

[226] When using the term "political party" in the context of a particular state, this Article is collectively referring to the state party itself, the state party's central committee (if one exists), the county-level political parties in that state (along with their committees), as well as the political parties' committees in individual legislative districts. The distinctions between these entities are important, but it's not worth getting lost in the details in this particular context.

[227] N.J. CONST. art. IV, § 4, para. 1; COLO. REV. STAT. § 1-12-203 (2019); D.C. CODE § 1-204.01(d)(2) (2020); 10 ILL. COMP. STAT. ANN. 5/25-6 (West 2019); BURNS IND. CODE ANN. § 3-13-5-0.1 (2020); N.D. CENT. CODE § 16.1-13-10 (2020); P.R. LAWS ANN. tit. 16, § 4146 (2019).

elections,[228] some allow for another appointment process,[229] and New Jersey leaves the seat vacant for the remainder of the term.[230]

B. The Limitations on Appointments

Though many different actors, both state and party, have a role in filling legislative vacancies, almost all are subject to some combination of preconditions or restrictions—*i.e.*, requirements for their power to exist or restrictions on the replacements they appoint. Some of these requirements have been addressed in passing in the previous Section, but all fall into three general categories: how a legislator was elected, when the vacancy occurred, and for how long the appointee can serve.

First, virtually all jurisdictions with legislative appointments impose requirements that are triggered by how the legislator was elected. The most common requirement here is that the replacement legislator be of the same party as the previous incumbent.[231] However, as mentioned previously, several states—Nebraska, New Mexico, South Dakota, Tennessee, Vermont—and American Samoa establish no such requirement.[232] In all five states (and American Samoa), governors or county commissions, as the case may be, can appoint whomever they want. And in the Northern Mariana Islands, the governor is held to an anti-same-party requirement; she is required to appoint the runner-up from the previous election.[233]

Within the confines of requiring a same-party appointment, states are split on how to impose this requirement in filling vacancies of legislators elected as independents or as members of

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[228] § 3-13-5-0.1; tit. 16, § 4146.

[229] § 1-12-203 (vacancy committee created by independent candidate when filling for office appoints); § 1-204.01(d)(2) (city council appoints); 5/25-6 (governor appoints); § 16.1-13-10 (director of legislative management appoints).

[230] N.J. STAT. § 19:27-11.4 (2019).

[231] Depending on how the constitutional or statutory provisions are phrased, this can create largely unresolved questions about what happens when a legislator is elected as the nominee of one party, but changes parties while in office.

[232] S.D. CONST. art. III, § 10; NEB. REV. STAT. § 32-566 (2020); N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020); VT. STAT. ANN. tit. 17, § 2623 (2020); AM. SAMOA CODE ANN. §§ 2.0204, 6.0108 (West 2019).

[233] N. MAR. I. CONST. art. II, § 9.

third parties. Most states have established alternative processes for filling these kinds of vacancies, or fit them into their pre-existing processes,[234] while others have established no process whatsoever.[235]

Second, some jurisdictions—namely, Alaska, the Northern Mariana Islands, American Samoa, Tennessee, and the U.S. Virgin Islands—fill legislative vacancies differently depending on when they occur. These states and territories establish this precondition either based on how much time remains in the legislator's term at the time of the vacancy or how much time remains before the next regularly scheduled election. In Alaska, the governor can fill a senate vacancy only if less than two years and five months remain in the predecessor's term. The governor of the Northern Mariana Islands is subject to a similar requirement, though the measurement—"less than one-half of the term"[236]—depends on

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[234] ALASKA STAT. § 15.40.330(a) (2019) (governor can appoint "any qualified person," and only a member of a political party is subject to confirmation); ARIZ. REV. STAT. ANN. § 41-1202 (B) (2020) (citizens panel makes recommendations to county supervisors); COLO. REV. STAT. § 1-12-203 (2019) (vacancy committee designated by independent candidate on petition makes appointment); D.C. CODE § 1-204.01(d)(2) (2020) (city council appoints); HAW. REV. STAT. ANN. §§ 17-3, 17-4 (West 2019) (governor appoints another independent); 10 ILL. COMP. STAT. ANN. 5/25-6(b) (West 2019) (governor appoints another independent); BURNS IND. CODE ANN. § 3-13-5-0.1 (2020) (special election to fill independent vacancies); MONT. CODE ANN. § 5-2-402 (2019) (county commission appoints replacement); N.D. CENT. CODE § 16.1-13-10 (2020) (director of legislative management appoints); OR. REV. STAT. § 171.060 (2020) (county commission appoints); WYO. STAT. § 22-18-111(a)(iii)(C) (2020) (county commission appoints); P.R. LAWS ANN. tit. 16, § 4146(3) (2019) (special election to fill independent vacancies); V.I. CODE ANN. tit. 2, § 111 (2020) (legislature selects by two-thirds vote).

[235] MD. CONST. art. III, § 13; NEV. CONST. art. IV, § 12; N.J. CONST. art. IV, § 4, para. 1; OHIO CONST. art. II, § 11; WASH. CONST. art. II, § 15; IDAHO CODE § 59-904A (2020); KAN. STAT. ANN. § 25-3902 (2019); NEV. REV. STAT. ANN. § 218A.260 (2019); N.C. GEN. STAT. § 163-11 (2019); UTAH CODE ANN. §§ 20A-1-503(2–3) (2019); W. VA. CODE § 3-10-5 (2020). For a greater discussion of the difficulties with which independent or third-party legislators are replaced, see Tyler Yeargain, *Third Wheeling in the Two-Party System: How Same-Party Replacement Systems Impede the Replacement of Independent and Third-Party Legislators*, 123 W.V. L. REV. (forthcoming Fall 2020).

[236] N. MAR. I. CONST. art. II, § 9.

whether the legislator was a senator serving a two- or four-year term or a representative serving a two-year term.[237]

Meanwhile, in American Samoa, Tennessee, and the U.S. Virgin Islands, vacancies can only be filled through appointment depending on how close they occur to the next general election.[238] In Tennessee and the Virgin Islands, the vacancy must take place within a year of the general election.[239] But in American Samoa, the time period is even shorter—just three months.[240]

Third, some appointing actors face limitations on how long their appointee serves. The most common practices are to allow appointees to serve until the next general election in an even-numbered year or to serve for the remainder of the term.[241] Of course, when the vacancies occur in state legislative chambers to which members are only elected to two-year terms, these practices are one and the same. For the purposes of considering the interaction of legislative appointments and term lengths, it is helpful to note that all state representatives are elected to two-year terms, except for those in Maryland and North Dakota, and all state senators are elected to four-year terms, except for those in Arizona, Idaho, North Carolina, South Dakota, and Vermont.[242]

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[237] Senators in the Northern Mariana Islands are elected at-large from each of the three districts, with the top three candidates winning office. The top two candidates in each district serve four-year terms, but the third only serves a two-year term. *Id.* § 2.

[238] TENN. CODE § 2-14-202 (2020); tit. 2, § 11; AM. SAMOA CODE ANN. §§ 2.0204, 6.0108 (West 2019).

[239] § 2-14-202; § 111s.

[240] §§ 2.0204, 6.0108.

[241] N.J. CONST. art. IV, § 4, para. 1; NEV. CONST. art. IV, § 12; WASH. CONST. art. II, § 15; COLO. REV. STAT. § 1-12-203 (2019); HAW. REV. STAT. ANN. §§ 17-3, 17-4 (West 2019); MONT. CODE ANN. § 5-2-406 (2019); N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020); UTAH CODE ANN. § 20A-1-503(3) (West 2019); WYO. STAT. § 22-18-111(a) (2020); *see* Nev. Op. Att'y Gen. No. 1955-84 (1955).

[242] *Number of Legislators and Length of Terms in Years*, NAT'L CONF. ST. LEGIS. (Aug. 9, 2019), http://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx. In two others—Illinois and New Jersey—state senators are elected to terms under the "2-4-4 system," meaning that they're usually elected to four-year terms, but all state senators are up for election in the general election succeeding a redistricting. N.J. CONST. art. IV, § 2, para. 2 ("Each senator shall be elected for a term beginning at noon of the

Most states only allow appointed legislators to serve until the next election. This is the case in Colorado, the District of Columbia, Hawai'i, Montana, Nevada, New Jersey, New Mexico, Utah, Washington, and Wyoming.[243] The District of Columbia's application limits appointees to serving until a special election is scheduled.[244] It goes without saying, however, that in the other states, if a vacancy happens too close to a general election, the appointee serves until the *next* general election and, therefore, for the remainder of the term.[245]

Washington applies this rule rather bizarrely—the state has elections *every* year, so appointees only serve until the next annual election, regardless of whether it takes place in an even-numbered year or not.[246] Alaska applies a similar rule in a narrow set of circumstances. If a vacancy occurs in the senate, and there are more than two years and five full months remaining in the term, the governor is obligated to call a special election for November.[247] In this case, she may make a temporary appointment that only lasts until the legislature reconvenes after the special election results are finalized.[248] There's a catch, however. If the vacancy will be filled

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second Tuesday in January next following his election and ending at noon of the second Tuesday in January four years thereafter, except that each senator, to be elected for a term beginning in January of the second year following the year in which a decennial census of the United States is taken, shall be elected for a term of two years.").

[243] NEV. CONST. art. IV, § 12; N.J. CONST. art. IV, § 4, para. 1; WASH. CONST. art. II, § 15; § 1-12-203; §§ 17-3, 17-4; § 5-2-406; §§ 2-7C-5, 2-8D-4; § 20A-1-503(3); § 22-18-111(a); *see also* Nev. Op. Att'y Gen. No. 1955-84 (1955).

[244] D.C. CODE § 1-204.01(d)(2) (2020) ("The person appointed to fill such vacancy shall take office on the date of his appointment and shall serve as a member of the Council until the day on which the Board certifies the election of the member elected to fill such vacancy in either a special election or a general election.").

[245] NEV. CONST. art. IV, § 12; N.J. CONST. art. IV, § 4, para. 1; WASH. CONST. art. II, § 15; § 1-12-203; §§ 17-3, 17-4; § 5-2-406; §§ 2-7C-5, 2-8D-4; § 20A-1-503(3); *see also* Nev. Op. Att'y Gen. No. 1955-84 (1955).

[246] *See, e.g.*, *GOP Strengthens Senate Grip with Victory*, SPOKESMAN-REV. (Spokane, Wash.), Nov. 9, 2013, at B3 (discussing when a state senator appointed to fill a vacancy in January 2013 only served until the November 2013 election).

[247] ALASKA STAT. §§ 15.40.380, 15.40.390 (2019).

[248] *Id.*

by a special election *before* the legislature meets, she can't make an appointment, and the office remains vacant until the special election.[249] This bizarre application is rejected by other states, like Ohio, which also have annual elections. Ohio's constitution makes it quite clear that, when it says "next general election," it does not mean to subject its appointees to this application.[250]

Many other states allow appointees to serve for the remainder of the term. Most states with this rule attach some sort of temporal restrictions to it. For example, the appointee serves out the rest of the term so long as the vacancy occurs after a set period of time into the term; otherwise, she serves until the next general election.[251]

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[249] *Id.* § 15.40.320. This is, admittedly, quite (unnecessarily) complicated. Here's how it might apply in practice. The legislature is required to convene on the third Tuesday in January and the session lasts for ninety consecutive calendar days. *Id.* §§ 24.05.090, 24.05.150. Suppose that a state senator elected at the most recent general election resigns in April of an odd-numbered year. The vacancy would clearly be able to be filled by a special election prior to the beginning of the next session in January, so the governor would schedule the special election for November and wouldn't be entitled to appoint a replacement. But suppose that a joint or special session occurs in May. A joint session must be held, *inter alia*, upon receipt of the governor's veto, ALASKA CONST. art. II, § 16, and a special session can occur if the governor calls one or the legislature votes to reconvene. § 24.05.100. In that case, the governor would presumably be able to fill the vacancy until the November special election. Let's change the facts. Suppose that a state senator was elected in November of an even-numbered year and died one day after the legislature convened and she was sworn in. In that case, the governor would schedule a special election for November and would make an appointment that would last until then. *See* ALASKA CONST. art. II, § 16; § 24.05.100.

[250] OHIO CONST. art. II, § 11 ("A vacancy occurring before or during the first twenty months of a Senatorial term shall be filled temporarily by election as provided in this section, for only that portion of the term which will expire on the thirty-first day of December following the next general election occurring in an even-numbered year after the vacancy occurs, at which election the seat shall be filled by the electors as provided by law for the remaining, unexpired portion of the term, the member-elect so chosen to take office on the first day in January next following such election.").

[251] *Id.* (providing for appointment if the vacancy occurs "before or during the first twenty months of a Senatorial term"); §§ 15.40.370, 15.40.380 (filling legislative vacancies as specified in note 249); 10 ILL. COMP. STAT. ANN. 5/25-6(f) (West 2019) (providing for appointment if state senate vacancy occurs with twenty-eight months or fewer remaining); NEB. REV. STAT. § 32-566(2) (2020) (providing for appointment for the term's duration only if vacancy occurs after

However, Indiana, Kansas, Maryland, and Puerto Rico allow the appointees to serve the full remainder of the term in all circumstances.[252]

As mentioned previously, this distinction is irrelevant for appointed legislators in Arizona, Idaho, North Carolina, South Dakota, and Vermont, who serve both for the remainder of the term and until the next general election. And for the states and territories that attach temporal preconditions to making an appointment in the first place—like the Northern Mariana Islands, American Samoa, Tennessee, and the U.S. Virgin Islands[253]—this distinction is similarly irrelevant.

IV. THE HISTORICAL CONTEXT

The adoption of legislative appointment schemes has, so far, attracted little attention from political scientists, historians, or legal scholars. There are few contemporaneously written articles about the constitutional and statutory changes that brought such systems about, and even fewer about the effects and practical characteristics of these systems. Accordingly, developing a single narrative about *why* these systems were adopted is less a matter of block-quoting from hundred-year-old texts or citing to unread law review articles from decades past. It is instead a matter of thinking conceptually

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May 1 of the second year of the term); N.D. CENT. CODE §§ 16.1-13-10(1), 16.1-13-10(2) (2020) (providing for appointment unless more than 828 days remain in the term, or a special election is called); OR. REV. STAT. § 171.051(4) (2020) (providing for appointment unless vacancy occurs in state senate before sixty-first day before first general election held during that term of office); W. VA. CODE §§ 3-10-1(b), 3-10-5(b–c) (2020) (providing for appointment unless the vacancy occurs in the state senate prior to the eighty-fourth day before the primary election).

[252] MD. CONST. art. III, § 13(a)(4); KAN. STAT. ANN. § 25-3902 (2019); BURNS IND. CODE ANN. § 3-13-5-8 (2020); P.R. LAWS ANN. tit. 16, § 4146 (2019). This aspect of the Maryland provision has attracted negative attention in recent years. *See* Tyler Yeargain, *Maryland's Legislative Appointment Process: Keep It and Reform It*, 50 U. BALT. L.F. (forthcoming Fall 2020). For a greater discussion of the provision, along with contemporary efforts to amend it, see *id.*

[253] N. MAR. I. CONST. art. II, § 9; TENN. CODE §§ 2-14-202–2-14-203 (2020); V.I. CODE ANN. tit. 2, § 111 (2020); AM. SAMOA CODE ANN. §§ 2.0204, 6.0108 (West 2019).

about these changes, including how they fit into established patterns of state constitutional change; considering the relationship between legislative appointments and better-documented democratic reforms; and, above all, speculating and making educated guesses based on the aforementioned. Accordingly, Part IV of this Article leans into this vagueness and opacity and seeks to both contextualize legislative appointments historically and explain the contemporary relevance of recounting this legal history.

Section A begins by reviewing the stated justifications for the adoption of these schemes. It primarily looks to legislative materials—like senate and house journals, governors' messages, and voter information pamphlets—but pulls from secondary sources where they are available. Its ultimate takeaway is that the change from special elections to temporary appointments was justified largely as a matter of efficiency and good government. Section B argues that, in addition to these practical justifications, legislative appointment schemes likely grew out of the reforms pushed by Progressive Era reformers—like the direct election of Senators, the short ballot initiative, proportional representation, unicameralism, and commission-style government.

Section C concludes this Part by, in effect, justifying this Article. It argues that documenting the legal history of legislative appointments, and in turn, identifying legislative appointments as a Progressive Era reform, helps contextualize *other* progressive reforms, like initiatives, referenda, recall elections, and the direct election of Senators. The historical contextualization added by the legal history of legislative appointments has a symbiotic relationship with these other reforms—it helps clarify their meanings and their place in contemporary American democracy and, in turn, that context helps justify the adoption of legislative appointment schemes in other states.

A. The Explicit Justifications

Of the thirty jurisdictions that have embraced some form of legislative appointments, exceedingly few have clearly explained their reasons for doing so. And when they involved amending the state constitution through a voter-approved amendment, few voter

information pamphlets[254] or newspaper editorials[255] crystallized thoughtful arguments for, or against, such measures. This might be explained by their relatively uncontroversial nature, the rarity with which legislative vacancies occur in the first place, and that many of the constitutional amendments shared the ballot with much more controversial changes.[256] Nonetheless, where explanations are available, they focus less on grand theories of constitutional or government reform and more on practical concerns—the problems

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[254] *See, e.g.*, J. GRANT HINKLE, A PAMPHLET CONTAINING COPY OF A MEASURE "PROPOSED BY INITIATIVE PETITION" AND A MEASURE "PROPOSED TO THE LEGISLATURE AND REFERRED TO THE PEOPLE," AND AMENDMENTS TO THE CONSTITUTION PROPOSED BY THE LEGISLATURE TO BE SUBMITTED TO THE LEGAL VOTERS OF THE STATE OF WASHINGTON FOR THEIR APPROVAL OR REJECTION AT THE GENERAL ELECTION TO BE HELD ON TUESDAY, NOVEMBER 4, 1930 27 (1930) (listing no arguments for or against Washington's proposed constitutional amendment); HAL E. HOSS, PROPOSED CONSTITUTIONAL AMENDMENTS AND MEASURES 21 (1930) (listing no arguments for or against Oregon's proposed constitutional amendment).

[255] *Support Tax Amendments; Remedy to Lighten Burden*, GUNNISON VALLEY NEWS, Oct. 30, 1930, at 1 ("This amendment [to the Utah Constitution] would allow the legislature to avoid the expense of calling special elections to fill vacancies in the legislature and in congress."). In fact, the Gunnison Valley News's published explanation of the amendment, written by the Citizens' Tax Revision League, is incorrect—the amendment didn't alter how congressional vacancies were filled, illustrating how little it was thought of or considered. *But see* Milner, *supra* note 152 ("Opponents argue that legislation which would permit counties concerned to make the selections would be more advisable.").

[256] Milner, *supra* note 152, at 1 ("Amendments to the state constitution affecting the permanent school fund, use of motor vehicle tax revenue, and filling legislative vacancies will be considered by South Dakota voters next Tuesday . . . . The most vigorous discussion over these special issues has been over Amendment 'C.' Two groups, both claiming devotion to saving the permanent school fund, have been campaigning."); Gene Morris, *Yes or No? Labor Leader Says Vote 'Yes' on Tax Revision*, SALT LAKE TELEGRAM, Oct. 30, 1930, at 1 ("[Amendment] No. 1 would empower the legislature to provide a method of filling vacancies. This has been almost entirely overlooked in discussion and might possibly be defeated through the creation of an adverse sentiment against all amendments. Recently two vacancies in the legislature remained unfilled because the method provided in the constitution appeared too cumbersome and expensive. This amendment should receive the favorable vote of all citizens.").

faced and how legislative appointments operate as a solution for them.

One of the most common reasons, cited by policymakers, was the cost of holding special elections. Though few studies have quantified exactly how much special elections cost,[257] it was clearly an overriding concern. The governors of Utah and Wyoming, in messages to each of their legislatures in 1930 and 1949, respectively, urged the adoption of legislative appointments specifically for this reason.[258] Delegates to the 1965 and 1977 Tennessee Constitutional Conventions cited the "sheer cost of an election" as a reason for adopting legislative appointments.[259] In hearings before Congress in 1930 on the proposal to abolish special elections in Puerto Rico, a senator from Puerto Rico testified that the cost was so prohibitive—especially for legislators elected at-

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[257] One estimate from researchers at the University of Central Arkansas concluded that since 1981 special sales tax elections "have cost a cumulative $7.4 million (in inflation-adjusted dollars)." Jeremy Horpedahl, *The Sales Tax, Special Elections, and Voter Turnout*, ARK. CTR. FOR RES. IN ECON. (Mar. 16, 2017), https://uca.edu/acre/2017/03/16/the-sales-tax-special-elections-and-voter-turnout/. In any event, it is clear that the costs of election administration today dramatically exceed such costs in the early-to-mid-twentieth century, when the lion's share of states that adopted legislative appointments did so. *See generally* Robert S. Montjoy, *The Changing Nature and Costs of Election Administration*, 70 PUB. ADMIN. REV. 867 (2010) (discussing how recent changes have significantly altered the nature of election administration and driven up costs).

[258] Arthur G. Crane, Governor's Message to the Thirtieth State Legislature (Jan. 12, 1949), *in* H. JOURNAL, 30th Leg., Gen. Sess. 37–38 (1949) ("When vacancies occur in your membership, the Constitution and subsequent legislation have required that these vacancies be filled by special elections. This procedure proved to be quite cumbersome, complicated and expensive."); S. JOURNAL, 18th Leg., 1st. Spec. Sess. 169 (1930) (message of Governor George H. Dern) ("The present constitutional provision and statute [requiring special elections] are a dead letter, and have never been invoked in the history of the state, on account of the unwarranted expense.").

[259] Laska, *supra* note 170; *see* James L. Bomar, former Lieutenant Governor of Tennessee, Address to the 1965 Tennessee Constitutional Convention (July 29, 1965), *in* 1965 TENNESSEE CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 170, at 415; *see also* 1 TENN. LIMITED CONST. CONVENTION OF 1977, *supra* note 217, at 509 (discussing the expense of holding a special election).

large—that the territory had never held a special election.[260] Similarly, when Congress considered abolishing legislative appointments—and restoring special elections—in the U.S. Virgin Islands, a representative of the St. Thomas Chamber of Commerce testified that the expenditure was simply not worth it.[261]

Policymakers also justified moving to legislative appointments on the grounds that special elections deprive voters of effective representation.[262] Because special elections can't happen *immediately* upon a vacancy occurring, an interim period, in which the district is without representation, is largely inevitable.[263] This concern was compounded by the relatively short sessions during which legislatures met—if a vacancy occurred at the beginning, or in the middle, of a two- or three-month session, filling it before the end of the session was a practical impossibility.

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[260] *Filling of Certain Vacancies in the Senate and House of Representatives of Porto Rico: Hearing on S. 4502 Before the S. Comm. on Territories and Insular Affairs*, 71st Cong. 1–3 (1930) (statement of Santiago Iglesias, Member of the Puerto Rican Senate).

[261] Hearing on H. Res. 30 Before the H. Subcomm. on Territorial and Insular Affairs, 84th Cong. 32–33 (1956) (statement of George H. T. Dudley, Executive Committee of the St. Thomas Chamber of Commerce) [hereinafter Hearing on H. Res. 30] (describing a special election as "[j]ust another holiday, having a grand 'shebang' of everybody going to town trying to get 1 person voted for the expenditure we have when trying to elect 11").

[262] Crane, *supra* note 258, at 38; Hearing on H. Res. 30, *supra* note 261, at 32 ("The session lasts for 2 months. You are elected for 2 years."); Ralph M. Wade, *The Wyoming Legislature*, *in* LEGISLATIVE POLITICS IN THE ROCKY MOUNTAIN WEST: COLORADO, NEW MEXICO, UTAH, AND WYOMING 109, 118 (Susanne A. Stoiber ed. 1967) ("The infrequency of sessions, limitations upon the length of the term and the costs, seem to require, however, a method of filling vacancies less time-consuming and expensive than special elections."); 1965 TENNESSEE CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 170, at 415 (remarks of James L. Bomar) ("[T]he sheer mechanics of calling a new election in the counties means that it's almost impossible to get a legislator in to represent those counties before the end of the session as it now has been constituted.").

[263] In Virginia, for example, a special election can take months to schedule, if it happens at all. VA. CODE ANN. § 24.2-228.1 (2016); VA. CODE ANN. § 24.2-226 (2014); VA. CODE ANN. § 24.2-682 (2010). In Maryland, if a special election is called, it can take up to five months to fill a congressional vacancy. *See* MD. ELECTION LAW CODE ANN. § 8-710 (2017).

Though not apparent from the legislative history of any constitutional or statutory amendment, this concern about non-representation was surely magnified in the pre-*Reynolds v. Sims* era, in which districts had vastly disproportionate populations. Many state senates were initially modeled after the U.S. Senate, with each county being given just one state senator.[264] In those instances, an untimely vacancy could deprive a state's largest population center of representation in the state senate for the entire legislative session. Of course, the reverse was true, too—a small county deprived of its representation for a whole legislative session in a legislative chamber would suffer similar consequences. (Perhaps the takeaway is that, regardless of population, non-representation ought to be avoided.)

In some states, an unspoken motivation in adopting legislative appointment schemes may have been preventing non-representation by avoiding foreseeable special elections. In Idaho, for example, Senator D.W. Van Hoesen, who represented Adams County, passed away on January 16, 1923.[265] Ordinarily, then-Governor Charles C. Moore would have been obligated under Section 426 of the Idaho Code to call for a special election "at the earliest practicable time."[266] But the Idaho Legislature apparently wished to avoid that outcome and moved quickly to make sure it didn't happen. Just two days after Senator Van Hoesen's death, on January 18, Senators Clark and Eames introduced Senate Bill 56, which abolished Section 426 altogether.[267] It sped through committee review and was considered on the senate floor just two days later.[268] There, the senate unanimously voted to suspend "all rules of the Senate interfering with [Senate Bill 56's] immediate passage, . . . this being a case of urgency."[269] The bill was then passed out of the senate, 39–3, and sent to the house.[270] During the following four days, the house

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[264] *See* Arthur L. Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90, 100 (1962).

[265] S. JOURNAL, 17th Leg., Gen. Sess. 40–41 (Idaho 1923).

[266] IDAHO CODE ANN. § 462 (1919).

[267] S. JOURNAL, 17th Leg., Gen. Sess. 45 (Idaho 1923).

[268] *Id.* at 45, 52, 56.

[269] *Id.* at 56.

[270] *Id.* at 57.

passed the bill, both chambers' presiding officers signed off on it, and they sent it to the governor.[271] On January 24, Governor Moore signed the legislation[272] and immediately nominated the late senator's brother, Enderse G. Van Hoesen, to the senate.[273] The next day, the senate unanimously confirmed Van Hoesen's nomination.[274]

In short, just nine days after a state senator died, the Idaho Legislature passed legislation blocking a special election to replace the deceased and confirmed his brother as his successor.[275] Even more surprisingly, the mechanism through which all of this occurred was relatively crude. The bill passed by the legislature simply repealed the specific requirement that legislative vacancies be filled through special elections—it didn't actually *replace* that requirement with anything else. Instead, in the absence of any clear mechanism, the governor simply relied on the power constitutionally and statutorily granted to him to fill a vacancy in any state office for which the law provided no other method of filling.[276] And despite the clumsiness of the process, it managed to

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[271] *Id.* at 62, 65, 67.

[272] *Id.* at 72.

[273] Letter from Charles C. Moore, Governor of Idaho, to the Senate of the State of Idaho (Jan. 24, 1923) (nominating Enderse G. Van Hoesen to the Idaho Senate), *in id.* at 72–73.

[274] *Id.* at 73. Senate Bill 56 may have been intended to prevent more than just a special election to replace Van Hoesen—a few days after signing it into law, the governor nominated Ezra P. Monson to fill a vacancy in the Idaho House. Letter from Charles C. Moore, Governor of Idaho, to the Senate of the State of Idaho (Jan. 27, 1923) (nominating Ezra P. Monson to the Idaho House of Representatives), *in id.* at 90.

[275] *Supra* notes 265–274 and accompanying text.

[276] IDAHO CONST. art. IV, § 6 ("The governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for."); IDAHO CODE ANN. § 57-904 (1932) ("All vacancies in any state office, and in the Supreme and district courts, unless otherwise provided for by law, shall be filled by appointment by the governor, until the next general election after such vacancy occurs, when such vacancy shall be filled by election."); *e.g.*, Letter from Charles C. Moore, Governor of Idaho, to the Senate of the State of Idaho (Feb. 19, 1925) ("I have the honor to advise that pursuant to the authority vested in me by Section 6, Article IV of the Constitution

survive unscathed until the legislature amended it in 1971 to require same-party appointments.[277]

Though not quite as thematically captivating, following the 1946 passage of a constitutional amendment in Kansas that allowed the legislature to determine how vacancies were filled, a state representative died. The legislature quickly moved to provide for a replacement mechanism, and a successor was sworn in merely weeks later.[278]

Finally, fitting into concerns about *non*-representation are concerns about *mis*representation. One of the (possibly) undesirable elements of special elections is that, in a low-turnout election scheduled on a seemingly random day, anything can happen, including the seat flipping parties.[279] This *could* serve as a reflection of a shift in voter preferences—but it may be just as likely a reflection of asymmetric voter enthusiasm. The history of legislative vacancies is replete with examples of a candidate winning the seat in a special election, picking it up for their party, only to lose the next scheduled general election. On this line, in 1971, nearly a half-century after Idaho first moved to gubernatorial appointments, Governor Cecil Andrus urged the formal codification of an unspoken custom by the governor to make a same-party appointment. He noted that "accidents of death or resignation should not be allowed to thwart the political preferences of the electorate."[280] In 1970, at the Sixth Illinois Constitutional

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of the State of Idaho, I hereby nominate, and, subject to the consent of the Senate, appoint Mr. James C. Mills, Jr., of Garden Valley, Boise County, Idaho, a member of the House of Representatives of the State of Idaho for Boise County, for the term ending December 1, 1926."), *in* S. JOURNAL, 18th Leg., Gen. Sess. 283 (Idaho 1925).

[277] Act of Mar. 16, 1971, ch. 128, 1971 Idaho Sess. Laws 509–10.

[278] H. JOURNAL, 35th Leg., Gen. Sess. 4, 46, 398 (Kan. 1947).

[279] For example, in several 2017 special elections in Oklahoma, Democrats won several state legislative seats that had been held by Republicans and in otherwise reliably conservative areas. David Weigel, *Democrats See Hope in Oklahoma Special Elections*, WASH. POST (July 12, 2017, 6:05 PM EDT), https://www.washingtonpost.com/news/powerpost/wp/2017/07/12/democrats-see-hope-in-oklahoma-special-elections/.

[280] Cecil D. Andrus, Governor's Message to the First Regular Session, Forty-First Legislature of Idaho (Jan. 11, 1971), *in* H. JOURNAL, 41st Leg., 1st Reg. Sess. 19 (Idaho 1971).

Convention, the convention adopted a constitutional amendment providing for same-party legislative appointments. The author of the amendment explained that it was meant to "protect the representation of that district and . . . protect the political party that achieved the seat in the [last] election."[281]

B. Understanding Legislative Appointments as a Progressive Era Reform

These proffered explanations, however, remain somewhat unsatisfying. Within twenty-five years of the first modern adoption of a legislative appointment scheme in Nebraska, nearly a quarter of states had adopted something similar. Though the process slowed considerably from there, in the next sixty years, another quarter of states did the same. Is it really plausible to say that this widespread acceptance came solely because of the practical benefits?

This Article posits that there's another explanation—that legislative appointment schemes, in their modern form, are best understood as a Progressive Era reform. The path to this conclusion is somewhat indirect, relying on implied connections to reforms clearly borne out of the era. But in examining the principles of these other reforms, proposed or realized—like the "short ballot" movement, proportional representation, unicameralism, commission-style government, and the direct election of Senators under the Seventeenth Amendment—legislative appointments fit neatly into the same conceptual category. Each reform, and how legislative appointments fit into them, is discussed in turn.

The "short ballot" movement remains one of the less-discussed progressive reforms, but the results of its success are apparent on each Election Day. The movement, organized by Richard Childs in the early twentieth century, sought to, as the name implies, make ballots shorter by making some public officials appointed instead of elected.[282] The argument behind it was relatively simple, and

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[281] 4 Record of Proceedings, Sixth Illinois Constitutional Convention, Verbatim Transcripts: July 10, 1970 to August 5, 1970 2667 (1970) [hereinafter Sixth Illinois Constitutional Convention Proceedings].

[282] Sarah M. Henry, *Reviewed Work: Democracy Reformed: Richard Spencer Childs and His Fight for Better Government by Bernard Hirschhorn*, 571 FEMINIST VIEWS SOC. SCI. 219–20 (2001).

reflected both a cynical and realistic view of how elections were conducted—there are so many elections that take place and so many positions voted on at each election that voters don't know what they're voting for.[283] By cutting down the number of elected positions, the movement sought to "make politics so simple that what the average citizen knows will be all there *is* to know."[284] Though there are only fleeting mentions of special elections in short ballot literature, many of the movement's most prominent supporters—like Teddy Roosevelt and historian Charles A. Beard—specifically drew attention to the frequency of elections,[285] an ill to which special elections certainly contributed. Moreover, the National Short Ballot Organization approved of state-level reforms to abolish special elections and to fill vacancies with appointments in other contexts.[286] It would make sense, therefore, that short ballot advocates—notwithstanding their general belief that legislatures should be elected, not appointed[287]—would favor the idea of filling legislative vacancies with temporary appointments. The point of the movement was to make politics and elections easier for the average citizen to understand, and to prevent politicians from making voters

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[283] Richard S. Childs, *The Short Ballot Movement and Simplified Politics*, 64 ANNALS AM. ACAD. POL. & SOC. SCI. 168, 168–69 (1916).

[284] *Id.* at 169.

[285] THEODORE ROOSEVELT, AMERICAN IDEALS, AND OTHER ESSAYS, SOCIAL AND POLITICAL 127 (G.P. Putnam's Sons 1920) ("Governmental power should be concentrated in the hands of a very few men, who would be so conspicuous that no citizen could help knowing all about them; *and the elections should not come too frequently*." (emphasis added)); *see also* Charles A. Beard, *The Ballot's Burden*, 24 POL. SCI. Q. 589, 599–600 (1909) (critically noting that nine elections were held in Sioux City, Iowa in 1908 alone).

[286] *City Manager Progress: New Jersey in Line*, SHORT BALLOT BULLETIN (Nat'l Short Ballot Org., New York, N.Y.), Dec. 1917, at 3 (approvingly discussing state legislation that sought "to avoid the expense of a special election [by] provid[ing] that the first two vacancies in the council shall be filled from an alternate list consisting of the persons who stand sixth and seventh on the ballot at the election of members of the council").

[287] RICHARD S. CHILDS, SHORT-BALLOT PRINCIPLES 104 (Houghton Mifflin Co., The Riverside Press 1911) ("Now, legislators cannot be made appointive. To leave them elective and diminish their importance by providing other ways of law-making, such as the initiative and referendum, is to divert what little light now shines upon them, and . . . such movements are in the wrong direction.").

numb to the process by piling on more and more elections. To accomplish this, they advocated for fewer positions to be elected at fewer elections—a position entirely consistent with abolishing special elections to the legislature. Moreover, election reformers in the decades that followed, specifically inspired by the short ballot movement, explicitly used the principles of the movement to advocate for an end to special elections.[288]

Another favorite idea of the Progressive Movement was to abolish bicameral legislatures (or, more accurately, the upper chamber of state legislatures) and replace them with unicameral legislatures. These efforts were largely unsuccessful—only Nebraska adopted such a system, though several other states got close—but the underlying philosophy survived in other forms.[289] Some unicameral advocates articulated not merely minor changes to state government—insofar as abolishing a chamber of the legislature can be considered "minor"—but instead, rather dramatic overhauls of the modern state government system. These advocates—William S. U'Ren of Oregon and Governor George Hodges of Kansas—advocated for unicameralism specifically as a means of achieving a commission-style or pseudo-parliamentary government.[290] The early attempts to constitutionally or statutorily codify these proposals, as they related to filling legislative vacancies, provided

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[288] *See* JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 70 (1934) ("The following recommendations . . . deal with the time and frequency of elections, the manner of placing names on the ballot, and the short ballot. These recommendations are designed to reduce the number of elections, to lessen the bother to voters, and to simplify the problem of voting . . . . *Specification 42*.—In order to avoid the expense and bother of a special election, vacancies should be filled by appointment until the next regular election.").

[289] Patricia Shumate Wirt, *The Legislature*, *in* SALIENT ISSUES OF CONSTITUTIONAL REVISION 68, 71–72 (John P. Wheeler, Jr. ed. 1961).

[290] H. JOURNAL, 18th Leg., Gen. Sess. 1039–41 (Kan. 1913) (message from Governor George Hodges) (advocating for the adoption of a small, unicameral legislature in which the governor sat as an *ex officio* member and the presiding officer); *see* David Elvin Lindstrom, W. S. U'Ren and the Fight for Government Reform and the Single Tax: 1908–1912 52–53 (July 28, 1972) (unpublished M.S. dissertation, Portland State University) (on file with the Portland State University Library) (describing that, under U'Ren's system, the Oregon State Senate would be abolished and the governor and cabinet were members of the legislature).

for some form of appointments.[291] The eventual adoption of appointment methods, especially in the states in which these dramatic democratic proposals were introduced or seriously considered, may be an indirect result of unicameral advocates.

The influence of the Model State Constitution, a repository of progressive reforms,[292] on the adoption of appointment schemes further suggests that the schemes were born out of the Progressive Movement. The first Model State Constitution, drafted in 1921 by the National Municipal League, proposed a unicameral state legislature elected by proportional representation at the district level, similar to what many unicameral advocates were suggesting.[293] Due to the practical impossibility of holding a special election for a legislator elected by proportional representation, the Model State Constitution provided for a method of same-party appointment.[294] This is, perhaps, the most direct evidence that appointment schemes are best understood as progressive reforms. Many states ultimately relied on the Model State Constitution in revising their state constitutions,[295] though the impact of this specific provision is less clear-cut.

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[291] C.A. Dykstra, *The Reorganization of State Government in Kansas*, 9 AM. POL. SCI. REV. 264, 270 (1915) (noting that an introduction of Hodges's proposal by State Senator J.W. Howe, an ally of Hodges, made "provisions for the filling of vacancies by the governor except within sixty days of a regular election.").

[292] *See, e.g.*, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 155 (1998) ("What did feature prominently in the initial Model State Constitution . . . was the Progressive concern for promoting direct democracy and correcting abuses of power."); G. Alan Tarr, *Models and Fashions in State Constitutional Law*, 1998 WIS. L. REV. 729, 734–35 (1998) ("The crucial development was the publication of the National Municipal League's Model State Constitution in 1924. This model constitution reflected the Progressive dissatisfaction with existing political arrangements, which its proponents claimed impeded effective leadership and concerted action.").

[293] NAT'L MUN. LEAGUE, PROGRESS REPORT ON A MODEL STATE CONSTITUTION 3–4 (1921).

[294] *Id.* at 4 ("Whenever a vacancy shall occur in the legislature the governor shall issue a writ of appointment for the unexpired term. Such vacancy shall thereupon be filled by a majority vote of the remaining members of the district in which the vacancy occurs.").

[295] Tarr, *supra* note 292.

Moreover, how legislative appointments functioned in the constitutional distribution of power at the state level also suggests that they were a Progressive Era reform. Prior to the twentieth century, especially in the post-Revolutionary period, state legislatures were substantially more powerful than governors.[296] Though governors began gaining power during and after Reconstruction,[297] it was the Progressive Movement that substantially strengthened executive power, largely to increase the efficiency of state government and to more effectively use the state's power to achieve their progressive regulatory aims.[298] These increased powers added to reforms that took place in the nineteenth century, like the governor's ability to appoint state officials, and worked to further expand governors' powers in that regard.[299] Given that most states with legislative appointment schemes have granted their governors power to appoint, albeit with varying degrees of restrictions,[300] it seems logical that the increased power of governors generally coincided with granting governors power to fill legislative vacancies.

Finally, the Seventeenth Amendment, which provided for the direct election of U.S. Senators,[301] also suggests that moving away from special elections was an outgrowth of the Progressive Movement. Admittedly, it may seem paradoxical to suggest that a constitutional amendment providing for the direct election of Senators speaks to the motivation of filling legislative vacancies by appointment. How could states adopt the Seventeenth Amendment, which was proposed to remedy the "evils infecting senatorial selection" by state legislatures and which "evinces strong

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[296] *E.g.*, James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 822, 836 (1991).

[297] SALADIN M. AMBAR, HOW GOVERNORS BUILT THE MODERN PRESIDENCY 87–93 (2012).

[298] Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496–97 (2017).

[299] DAVID R. BERMAN, GOVERNORS AND THE PROGRESSIVE MOVEMENT 7, 261–62 (2019).

[300] *See supra* notes 195–209.

[301] U.S. CONST. amend. XVII.

democratic resolve,"[302] and do something seemingly inapposite for filling state legislative vacancies? But the Seventeenth Amendment does more than just alter how Senators are *initially* elected—it also alters how Senate vacancies are filled. The Seventeenth Amendment provides a default of special elections, but also allows state legislatures to empower governors to make temporary appointments until the next election.[303] This was a dramatic change from the previous mechanism, which only allowed governors to fill vacancies if the state legislature—which would normally fill vacancies itself—was not in session. This new method provided by the Seventeenth Amendment roughly mirrors what many states have since set as the method for filling legislative vacancies, almost down to the wording itself.[304]

Moreover, the motivations behind the Seventeenth Amendment are somewhat parallel to the motivations behind legislative appointments. Though broad worries about corruption and special interest influence in state legislatures motivated the direct election of Senators,[305] progressive advocates were also motivated by the "persistent vacancies in the Senate" caused by difficulties in electing Senators and the need to "facilitate[e] prompt Senate replacements."[306] These practical concerns revolving around the ills of non-representation are quite close to the explicit justifications for moving away from special elections, as discussed previously.

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[302] Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendmsent*, 64 TEMP. L. REV. 629, 636–37 (1991).

[303] U.S. CONST. amend. XVII.

[304] *Compare id.* ("That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."), *with*, *e.g.*, ALASKA CONST. art. II, § 4 ("A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment.").

[305] *E.g.*, Amar, *Indirect Effects of Direct Election*, *supra* note 124, at 1353–54.

[306] Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 HASTINGS CONST. L.Q. 727, 751 (2008) [hereinafter Amar, *Are Statutes Constraining Gubernatorial Power?*].

Finally, the timing of when states adopted legislative appointments, compared to when the Seventeenth Amendment was ratified, along with which states timely ratified the Seventeenth Amendment, also suggests that one motivated the other. Nebraska, the first state to provide for legislative appointments, did so in 1911, just a few years before the Seventeenth Amendment took effect—but in 1909, Nebraska became the second state to create a workaround to the previous requirement of senatorial appointments by holding advisory senate "elections" and requiring the legislature to honor the results.[307] Almost every other state that adopted legislative appointments did so after the Seventeenth Amendment was ratified, and some did so relatively soon after. From 1911 to 1936, a twenty-five-year period that roughly follows the U.S. House of Representatives adopting a constitutional amendment to provide for the direct election of Senators, eleven states ditched special legislative elections in favor of legislative appointments, compared to zero states that made a similar change in the twenty-five-year period *before* then.[308] Moreover, states that timely ratified the Seventeenth Amendment are likelier than states that didn't to have adopted legislative appointment schemes. Of the thirty-six states that timely ratified the Seventeenth Amendment, twenty-one of them ultimately adopted legislative appointment schemes.[309] And of the twelve states that either didn't ratify it or didn't timely do so, all

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[307] Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENT. 201, 206–09 (1996).

[308] *See supra* note 149 and accompanying text.

[309] The Seventeenth Amendment was ratified by Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Louisiana ratified the Seventeenth Amendment a year after it was formally adopted. Meanwhile, Delaware and Utah voted against ratification, while Alabama, Florida, Georgia, Kentucky, Maryland, Mississippi, Rhode Island, South Carolina, and Virginia voted neither for nor against ratification. Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 167 n.6 (1997). Alaska and Hawai'i were not states at the time of ratification and aren't counted here.

of them except Maryland and Utah exclusively use special elections to fill legislative vacancies.[310] This connection between ratifying the Seventeenth Amendment and preferring temporary appointments for state legislative vacancies suggests that the Seventeenth Amendment and temporary appointments share a common goal—which helps influence the interpretation of both.

The combined effect of the parallel language and mechanism of filling vacancies between the Seventeenth Amendment and state legislative appointment statutes, the shared motivations behind both efforts, and the timing all provide evidence, albeit circumstantial, that the adoption of legislative appointments should be seen as a Progressive Era reform in the same vein as the Seventeenth Amendment.

C. The Modern Relevance

Viewing legislative appointment schemes as progressive reforms helps better contextualize *other* progressive reforms, like the initiative, referendum, recall elections, and the direct election of Senators—and how all of them work together. These reforms, which have been adopted by many of the same states, work with each other to guarantee that the results of elections match the intent of the electorate. Understanding this symbiotic relationship helps justify the adoption of legislative appointment methods—which preserve the status quo and match results to intent, unlike special elections—but also provides additional context for how these methods and other reforms should be understood.

Most states (and territories) have adopted legislative appointments, initiatives (or referenda), or recall elections. Just eleven states—predominantly located in New England or the South—have adopted none of the three.[311] On the other side, an

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[310] *Compare id.* (noting the states that didn't timely ratify the Seventeenth Amendment), *with* MD. CONST. art. III, § 13, *and* UTAH CODE ANN. § 20A-1-503 (West 2019).

[311] Connecticut, Delaware, Iowa, Kentucky, New Hampshire, New York, Pennsylvania, South Carolina, Texas, and Virginia. *See Initiative and Referendum States*, NAT'L CONF. ST. LEGIS., https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx (last visited Mar. 22, 2020) (noting the states with initiatives, popular referenda, and constitutional initiatives); *Recall*

equal eleven have adopted all three—all of which, save for the District of Columbia, are located in the West.[312] Thirteen more have adopted two of the three.[313] Regardless of how the numbers shake out, states with legislative appointments are disproportionately likelier to also have voter initiatives, referenda, or recall elections than are states that exclusively rely on special elections to fill legislative vacancies.

At first glance, adopting a legislative appointment scheme—which explicitly deprives voters of a chance to fill a legislative vacancy by election—hardly seems compatible with allowing voters to recall elected officials or pass laws and constitutional amendments at what are, essentially, special elections. Recall elections and voter initiatives are frequently justified as giving the electorate a check on the government outside of regularly scheduled elections.[314] If the ruling party in state government is deliberately ignoring the will of the electorate, voters can respond—at least, in the states that give them the option to—by recalling intransigent legislators, repealing the laws they pass through voter-initiated referenda, passing new laws of their own, and amending the constitution to establish new democratic norms.

So why shouldn't voters have the same ability to check the government in a special legislative election? Special elections, like the other reforms, are frequently justified as checks on the government[315] and are generally reported that way, particularly

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of State Officials, NAT'L CONF. ST. LEGIS., https://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx (last visited Mar. 22, 2020) (noting the states with the ability to recall state officials).

[312] Alaska, Arizona, Colorado, D.C., Idaho, Montana, Nevada, North Dakota, the Northern Mariana Islands, Oregon, and Washington. *See Initiative and Referendum States*, *supra* note 311; *Recall of State Officials*, *supra* note 311.

[313] California, Guam, Illinois, Kansas, Maryland, Michigan, Nebraska, New Jersey, New Mexico, Ohio, South Dakota, Utah, and Wyoming. *See Initiative and Referendum States*, *supra* note 311; *Recall of State Officials*, *supra* note 311.

[314] *See, e.g.*, DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 3 (2004); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 13, 14 (1997).

[315] Feigert & Norris, *supra* note 7, at 184, 195.

when they're high-profile. The best answer is that—regardless of voters' subjective intent in casting ballots in special elections—special elections operate, at best, as quixotic means of democratic accountability. This is because special elections occur with relative infrequency; are unlikely to occur in swing districts, where both sides have an approximately equal chance of winning; and almost always have poor turnout.

First, special legislative elections are *rare*. In a given two-year legislative session, the best data available suggest that legislative vacancies will occur about three percent of the time[316]—making them an occurrence that, per 100 legislators, happens about as frequently as blue moons.[317] It would be absurd to suggest that, absent any other avenue of expressing their discontent, voters should so rarely be able to have a special check on their state government. Second, the circumstances of the special elections that *do* take place make it clear that they usually present voters with a random opportunity to effectively express their views. Extreme gerrymandering has resulted in more "safe" seats for both parties than ever before,[318] meaning that the odds of a special election happening in a swing or marginal district are relatively slim, so those opportunities are even sparser than the vacancy rate suggests. That's borne out by the data as well—special legislative elections only result in party changes about a fifth of the time.[319] Third, special

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[316] Keith Hamm & David M. Olson, *Midsession Vacancies: Why Do State Legislators Exit and How Are They Replaced?*, *in* CHANGING PATTERNS IN STATE LEGISLATIVE CAREERS 127, 133 (Gary F. Moncrief & Joel A. Thompson eds., 1992).

[317] Ethan Siegel, *How Rare Is the All-in-One Supermoon, Blue Moon, and Lunar Eclipse, Really?*, FORBES (Jan. 24, 2018), https://www.forbes.com/sites/startswithabang/2018/01/24/how-rare-is-the-all-in-one-supermoon-blue-moon-and-lunar-eclipse-really/#381676cc3cf2.

[318] *See, e.g.*, CONG. RESEARCH SERV., 113TH CONG., THE EVOLVING CONGRESS 184 (Comm. Print 2014).

[319] *See* Drew Desilver, *U.S. House Seats Rarely Flip to Other Party in Special Elections*, PEW RES. CTR. (July 13, 2017), https://www.pewresearch.org/fact-tank/2017/07/13/u-s-house-seats-rarely-flip-to-other-party-in-special-elections/ ("Of the 130 House special elections since 1987, only 21 (16%) resulted in a seat changing from Republican to Democratic or vice versa—the last one nearly five years ago."); Daniel Donner, *The Year in Special Elections: Wow!!*, DAILYKOS (Dec. 30, 2017), https://www.dailykos.com/stories/2017

elections see low turnout.[320] They're scheduled at seemingly random times of the year, which negatively affects turnout.[321] And they're likelier than regularly scheduled elections to see adverse turnout effects from inclement weather.[322]

In this light, it makes little sense to provide voters with what is ostensibly a check on the government when that check only rarely occurs, doesn't work, and is all too likely to be affected by the bizarre turnout dynamics endemic to how it operates. Therefore, in states that have given voters other, far more effective tools of checking the state government, removing special elections from the toolbox—and replacing them with same-party appointments, which freeze the status quo—doesn't materially diminish voters' ability to check the government.

This symbiotic relationship between legislative appointments and these progressive reforms justifies the abolition of special legislative elections. Voters in states with these kinds of reforms have *better* opportunities to meaningfully express their opinions outside of regularly scheduled elections than do voters in states without those reforms but with special elections. They can sign petitions to challenge laws passed by the legislature, initiate laws or amendments of their own, or recall their elected officials. And when enough voters sign petitions, those efforts culminate in special

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/12/30/1726483/-The-year-in-special-elections-Wow ("There have been 70 D vs. R [state legislative special elections in 2017]. Of those, 24 seats were held by Democrats, and Republicans flipped just one. But Democrats flipped an incredible 13 seats out of the 46 held by Republicans, or almost one-third.").

[320] *See* Harvey J. Tucker, Low Voter Turnout and American Democracy 2 (Apr. 2004) (on file with the European Consortium for Political Research) ("Most special elections occur at unusual times and are the only contests on the ballot. Turnout is unusually low because contests are poorly publicized and potential voters receive little or no stimulus.").

[321] *See generally* SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS (2014) (arguing that the off-cycle scheduling of special elections diminishes turnout).

[322] *See, e.g.*, Jay D. Gatrell & Gregory D. Bierly, *Weather and Voter Turnout: Kentucky Primary and General Elections, 1990–2000*, 42 SE. GEOGRAPHER 114, 130–31 (2002) (discussing the effects of inclement weather on turnout in off-year state legislative elections); Huan Gong & Cynthia L. Rogers, *Does Voter Turnout Influence School Bond Elections?*, 81 S. ECON. J. 247, 250–52 (2014) (discussing effects of same on off-cycle school bond elections).

elections with real consequences, which special legislative elections can never be guaranteed to have.

With so many more effective outlets, voters are deprived of nothing by not being able to fill intrasession legislative vacancies at special elections. Indeed, they actually *gain* something by having same-party legislative appointments—specifically, their decisions at the ballot box are more meaningful because those decisions have staying power that lasts until the next election. They voted at the last general election and indicated whom they wanted representing them in the legislature; that decision remains protected under an appointment system. Not only are those voters guaranteed continued representation, but they're guaranteed continued representation *of their interests*. They don't suffer from non-representation because of a vacancy they couldn't control. And they don't suffer from misrepresentation if a low-turnout, off-year special election produces a bizarre result incompatible with the wishes of the broader electorate.

Understanding this symbiotic relationship—one in which results match intent—further contextualizes both legislative appointments and broader constitutional principles. For example, as mentioned in Part I, many same-party appointment systems contain degrees of vagueness. The governing statutes are frequently written in ways that don't account for unexpected circumstances, like legislators who switch parties[323] or independent and third-party legislators.[324] But the basic motivation of same-party appointments (matching results to intent) helps answer these questions of statutory interpretation. When voters from a district elect a legislator from the Democratic Party who ends up switching to the Republican Party and leaving office, it makes more sense to fill that vacancy with a Democrat than it does a Republican. Though relatively few cases have been litigated on the question of how a same-party appointment

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[323] *See generally* Tyler Yeargain, *Same-Party Legislative Appointments and the Problem of Party Switching*, 8 TEX. A&M L. REV. (forthcoming Fall 2020) (arguing that party-switching state legislators should be replaced in a same-party replacement system by reference to how they were last elected, not how they were last affiliated).

[324] *Supra* notes 221–225 and accompanying text.

system replaces a party switcher,[325] the legislative history and the contextualized symbiotic relationship identified by this Article could prove useful in answering those questions in the future.

They may also prove useful in addressing broader constitutional questions as they relate to interpreting the United States Constitution—specifically, the Seventeenth Amendment. The wording of the Seventeenth Amendment, which is reflected in state constitutions, has given rise to a discrete academic debate. Can state legislatures require governors to make same-party Senate appointments,[326] like they do in Arizona, Hawai'i, Utah, and Wyoming?[327] Can states allow the political party nominees for special Senate elections to be selected through methods other than primary elections?[328] When must a special election be held to fill a Senate vacancy?[329]

In attempting to answer these questions, legal scholars and federal courts alike have turned to the Seventeenth Amendment's

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[325] *E.g.*, State *ex rel.* Biafore v. Tomblin, 782 S.E.2d 223, 226 (W.V. 2016); *see also* Wilson v. Sebelius, 72 P.3d 554 (Kan. 2003) (involving same-party appointment in filling county treasurer vacancy); State *ex rel.* Herman v. Klopfleisch, 651 N.E.2d 995 (Ohio 1995) (involving same-party appointment in filling mayoral vacancy); Richards v. Board of County Commissioners of Sweetwater County, 6 P.3d 1251 (Wyo. 2000) (involving same-party appointment in filling county commission vacancy).

[326] *See generally* Amar, *Are Statutes Constraining Gubernatorial Power?*, *supra* note 306 (arguing that the Seventeenth Amendment prohibits same-party appointment requirements). *But see generally* Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment*, 35 HASTINGS CONST. L.Q. 713 (2008) (arguing that the Seventeenth Amendment permits such requirements). Litigation surrounding this question is rather limited. *See generally* Hamamoto v. Ige, 881 F.3d 719 (9th Cir. 2018) (involving constitutional challenge to Hawai'i's same-party appointment requirement to fill U.S. Senate vacancies).

[327] ARIZ. REV. STAT. § 16-222(C) (2018); HAW. REV. STAT. § 17-1 (2018); UTAH CODE ANN. § 20A-1-502 (West 2020); WYO. STAT. § 22-18-111(a)(i) (2020).

[328] *See generally* Trinsey v. Pennsylvania, 941 F.2d 224 (3d Cir. 1991) (involving constitutional challenge to Pennsylvania's method of party nomination in U.S. Senate special elections); Little, *supra* note 302.

[329] *See generally* Judge v. Quinn, 612 F.3d 537 (7th Cir. 2010) (discussing the filling of Barack Obama's Illinois Senate seat after his election to the presidency).

direct legislative history. They've considered how state legislatures operated in electing U.S. Senators—the answer, it turns out, is corruptly and quite badly—which provided the motivation for the amendment in the first place.[330] Vikram Amar, for example, contextualizes the Seventeenth Amendment as "one of a variety of legal devices that comprised a broad, albeit imperfectly orchestrated, movement toward popular control."[331] Laura Little argues that the Seventeenth Amendment "evinces strong democratic resolve" and specifically provides that "the process of filling vacancies must allow the people direct authority over the selection of their representatives."[332] These conclusions were arrived at by specifically considering the motivations of individual states in proposing and ultimately ratifying the amendment, along with the trajectory of popularly electing Senators at the state level.[333]

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[330] Amar, *Indirect Effects of Direct Election*, *supra* note 124, at 1353. Vikram Amar has argued that the motivation derived from:

> (1) the perception that bribery and corruption had tainted the state legislatures' choice of Senators; (2) the related belief that private interest groups dominated state legislatures to the point where senatorial choices did not adequately represent ordinary citizens; (3) the dissatisfaction with deadlocks in state legislatures that delayed the filling of vacant senatorial seats; and (4) the feeling that state legislators were spending too much time on the "national" matter of senatorial selection, thus leaving local matters untended.

Id.

[331] *Id.* at 1353–54.

[332] Little, *supra* note 302, at 637.

[333] Amar, *Indirect Effects of Direct Election*, *supra* note 306, at 1354–55 ("Throughout the 1890s and by the early 1900s, various States were devising more or less effective means of limiting state legislators' discretion in their choice of Senators. The most sophisticated and effective device, the so-called Oregon Plan, was a state constitutional amendment that bound state legislators to elect the Senator who gained the greatest electoral support from the State's general electorate. By 1909, Nebraska and Nevada had copied this design, and I think it fair to say that even without ratification of the Seventeenth Amendment, direct election would be with us today in most if not all States."); Little, *supra* note 302, at 638 ("One potential source of guidance is the post-ratification of the Amendment. Because the text of the Seventeenth Amendment authorizes States to institute procedures for filling vacancies, the procedures that the States

It is to this broader discussion that this Article makes a powerful, albeit indirect, contribution. If states' intent in ratifying the Seventeenth Amendment was to provide for *immediate* special elections to fill U.S. Senate vacancies, and to *not* require governors to fill vacancies with temporary same-party appointments, as these scholars suggest, that's a bit difficult to square with the post-ratification activity at the state level, which saw clear momentum in favor of *abolishing* special elections and *adopting* temporary same-party appointments for state legislative vacancies.[334] Moreover, the Seventeenth Amendment was at least partially motivated by the "persistent vacancies" in the Senate caused by difficulties in electing Senators and the need to "facilitat[e] prompt Senate replacements"[335]—motivations that sound similar to the explicit justifications that supported a move to legislative appointments.[336] Accordingly, the legislative history of state legislative appointments, collectively recounted for the first time by this Article, may actually speak to how the Seventeenth Amendment's treatment of Senate vacancies was intended by the ratifying states in the twilight of the Progressive Era.

CONCLUSION

Dating back to the early colonial era of America, legislative appointment schemes have undergone tremendous change in the last 400 years. Though they initially functioned as elitist, anti-democratic mechanisms in the eighteenth and nineteenth centuries—in which the will of the people was repeatedly and purposefully stymied—they became something else entirely in the twentieth century, borne out of the Progressive Era. Today, these schemes have been embraced by more than half of the states and territories in the United States. Though they possess diversity in their approaches to the idea of temporary appointments, they share

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established in response to this charge could reveal the meaning they ascribed to the Amendment at the time they ratified it.").

[334] Surely states did not adopt a what-one-hand-giveth-the-other-taketh-away attitude with respect to legislative vacancies. *See supra* Part III.

[335] Amar, *Are Statutes Constraining Gubernatorial Power?*, *supra* note 306.

[336] *See supra* notes 262–288 and accompanying text.

an aim of preserving the status quo and making state-level government more democratic. And the context of their adoption provides broader effects still, both in interpreting them to preserve the intent of their drafters and even in interpreting the Seventeenth Amendment.

Their ultimate motivation was aptly summarized by Daniel W. Gooch, a delegate to the 1853 Massachusetts Constitutional Convention: "I grant you that non-representation is an evil; but it is not so great an evil as misrepresentation."[337]

[337] 1 1853 MASS. CONST. CONVENTION, *supra* note 81, at 107 (remarks of Delegate Daniel W. Gooch).